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VERSUS North Carolina

Date	Proceedings and Orders
Jun 5 1987	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jun 29 1987	Brief of respondent North Carolina in opposition filed.
Jul 1 1987	DISTRIBUTED. September 28, 1987
Oct 5 1987	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)
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PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

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No. 86-7075

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ANDREW WEDDINGTON CRAIG,

Petitioner,

-against-

THE STATE OF NORTH CAROLINA,

Respondent.

FRANCIS MARION ANTHONY,

Petitioner,

-against-

THE STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF CABARRUS COUNTY,
NORTH CAROLINA

W. Erwin Spainhour
Attorney for Andrew Weddington Craig

James C. Johnson, Jr.
Attorney for Francis Marion Anthony

Vivian Berger
Attorney for Francis Marion Anthony

64 pp

QUESTION PRESENTED

Where the only witness to implicate petitioners personally in the felony-murder on account of which they were sentenced to death recanted her testimony after trial, does the state court's out-of-hand rejection of this crucial, unsolicited new evidence:

(i) violate petitioners' Eighth and Fourteenth Amendment rights under Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, ____ U.S. ____, 55 U.S.L.W. 4496 (U.S. Apr. 21, 1987), since the state court held that the changed testimony would not have altered the result at trial because the killing was foreseeable -- the same standard used by the Arizona Supreme Court and expressly repudiated in Tison; and

(ii) deprive petitioners of their Eighth and Fourteenth Amendment rights to a reliable determination of facts essential to the constitutional validity of their sentences of death?

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No. 86-____

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TO THE SUPERIOR COURT OF CABARRUS COUNTY,
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Petitioners Andrew Weddington Craig and Francis Marion Anthony pray that a writ of certiorari issue to review the order of the Superior Court of Cabarrus County, North Carolina, denying petitioners' motion for appropriate relief from their convictions of first-degree murder and sentences of death.

CITATION TO OPINIONS BELOW

The order and opinion of the Superior Court of Cabarrus County, North Carolina, are attached as Appendix A to this petition; they have not been reported. The order of the Supreme Court of North Carolina denying petitioners' petition for a writ of certiorari to review the order of the Superior Court denying petitioners' motion for appropriate relief is attached as Appendix B; that order is also unreported. Also attached, as Appendix C, is the opinion of the Supreme Court of North Carolina on direct appeal, affirming petitioners' convictions and sentences of death over the dissent of Justice (now Chief Justice) Exum and Justice Frye. State v. Craig, 308 N.C. 466, 302 S.E. 2d 740, cert. denied, 464 U.S. 908 (1983).

JURISDICTION

The order of the Supreme Court of North Carolina, denying petitioners' petition for certiorari to review the order of the Superior Court of Cabarrus County (filed on May 6, 1986), was entered in the Supreme Court of North Carolina on April 9, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in pertinent part: "[N]or [shall] cruel and unusual punishments [be] inflicted...," and the Fourteenth Amendment to the Constitution, which provides in

pertinent part: "[N]or shall any State deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

A. Introduction

On March 3, 1982, petitioners, black men, were convicted of first-degree murder, robbery with a dangerous weapon, and common law robbery. Both Mr. Anthony and Mr. Craig received death sentences for the murder, as well as forty and ten-year consecutive terms of imprisonment for the robberies. The charges arose from an incident on July 8, 1981, in which Seab Ritch and his wife Edith were both robbed and Edith Ritch was stabbed and killed. The only witness at petitioners' trial who implicated the men in the stabbing was Betty Jean Howie, who admittedly participated in the robberies and the killing. In return for her testimony against petitioners, the state permitted Miss Howie to plead guilty to murder in the second degree, with the promise of a sentence of life imprisonment. Under the agreement, the life term would cover not only the crimes involved in the present case, but also an unrelated arson.

Within a few months of the affirmance of petitioners' convictions and sentences by the Supreme Court of North Carolina, startling new evidence became available. As developed in the record of petitioners' post-conviction motion for appropriate relief, see infra at pp. 7-9, the state's star witness, Betty Jean Howie, had lied in her previous statements that petitioners had been involved with her in the murder. Recanting her perjured

trial testimony, Miss Howie now admitted that she -- and she alone -- was responsible for the stabbing of Edith Ritch. Despite the wholly different complexion of this capital case after Ms. Howie's unexpected and unsolicited turnabout, the Superior Court of Cabarrus County denied relief and the Supreme Court of North Carolina declined to review the lower court's order.

As is more fully set out below, in declining to grant at a minimum a new sentencing proceeding, the Superior Court not only ignored controlling North Carolina precedent requiring that a new trial be conducted in the type of situation presented here but also -- of paramount significance in this Court -- violated petitioners' constitutional rights. It did so by approving their sentences of death without the assurance demanded by the Court in Enmund and Tison that either petitioner personally killed, attempted to kill, intended that a killing take place, or by his own conduct showed reckless indifference to human life.

B. The Evidence at Trial

On July 8, 1981, Seab Ritch and his wife, Edith, both alcoholics (S.E. 2, 251)[1], were returning from Charlotte from a Fourth of July weekend drinking binge, when they stopped by the

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[1] A copy of the transcript of the trial in this case, held in the Superior Court of Cabarrus County on February 22-March 3, 1982, was admitted as State's Exhibit 2 at the post-conviction hearing. References to that trial transcript will be indicated by the abbreviation "S.E. 2," followed by the number of the relevant page. References to the proceedings on the motion for appropriate relief, on January 28 and June 7, 1985, will be designated by "H," followed by the appropriate date and page.

Rocky River Bridge in Cabarrus County to finish their liquor before they got home. (S.E. 2, 199-204). Mr. Ritch, who was admittedly "pretty well drunk," walked down toward the river while Mrs. Ritch, also intoxicated, stayed in their truck. (S.E. 2, 205-06, 264, 328). When he arrived, Mr. Ritch saw Willie Johnson and two boys who had come with Johnson fishing on the bank. He proceeded to offer the fisherman a drink. (S.E. 2, 205-07).

Meanwhile, petitioners had spent the day with Betty Jean Howie and her brothers, John and Bobby Howie, drinking and fishing. First, the five spent two or three hours at a creek in Harrisburg. (S.E. 2, 348-54, 464-48). Next, they drove to the Rocky River, where they began fishing on the side opposite Seab Ritch and the Johnson group. (S.E. 2, 354-58, 467, 471-72, 591). After some hollering back and forth across the water, petitioners and John and Betty Howie (but not Bobby Howie) went over to Mr. Ritch's side to pursue an invitation to share his liquor. (S.E. 2, 358-61). More conversation and drinking ensued, following which Miss Howie, Mr. Anthony and Mr. Craig beat Mr. Ritch and took from him a pocket knife and several dollars, according to the state's evidence. (S.E. 2 365-66, 544-45, 570-71, 593-97, 603, 653-57).

Several witnesses, including Miss Howie, John Howie, Mr. Johnson and Anthony Carr (a fourteen-year old companion of Johnson) gave evidence concerning Seab Ritch's robbery. By contrast, only a single witness, Betty Jean Howie, purported to

give full account of the later robbery of Edith Ritch. Miss Howie stated that she left the river, walked to the truck, and sat down beside Mrs. Ritch, who was then seated behind the wheel. (S.E. 2, 653, 657). Shortly thereafter, petitioners arrived. Following a brief exchange of words regarding Mrs. Ritch's claim that she had no money, Miss Howie, Mr. Anthony and Mr. Craig robbed Mrs. Ritch of various items[2] and kicked her while she lay on the ground, having been pulled from the cab of the truck. (S.E. 2, 658-62).

Although several of the State's witnesses at trial testified to facts tending to confirm this robbery, no one other than Betty Jean Howie related seeing either petitioner lay a finger on Mrs. Ritch. Most critically, while the medical evidence was uncontradicted that the victim died of multiple stab wounds (S.E. 2, 327) "very much uniform in depth, range, uniform in angle of penetration and probably uniform forcewise [sic]" (S.E. 2, 334), only Miss Howie gave any testimony about the murder. According to Miss Howie, Mr. Craig started the stabbing. He then passed the knife to her, and she continued. She, in turn, handed the knife to Mr. Anthony, who used it as well. (S.E. 2, 659, 742).

Finally, Miss Howie testified that certain remarks were made later in the car. She and petitioners were sitting in back, Bobby Howie was driving, and John Howie was seated beside him.

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[2]The property taken from Mrs. Ritch consisted of her pocketbook, the truck's battery, and an FM converter (also from the truck). Only the converter was recovered and introduced at the trial. (S.E. 2, 806).

(S.E. 2, 478). Miss Howie said that she had stated "We done killed somebody" and that petitioners had said "Yeah" when Bobby Howie expressed disbelief. (S.E. 2, 753).

C. The Evidence at the Hearing on the Motion for Appropriate Relief

At the Superior Court hearing, petitioners introduced a letter written by Betty Jean Howie to Mr. Anthony in November, 1983 (D.E. 1, H1/28/85, 8-9, 38) as well as testimony by Miss Howie. The state, on its part, placed the transcript of the trial in evidence. (S.E. 2, H1/28/85, 38). In the letter--which was not solicited by either petitioner (H1/28/85, 10)--Miss Howie wrote of her former suffering, caused by guilt over having perjured herself at the trial; the peace she had newly found in religion; and her desire to set the record straight in this case, in the following words: "Francis, I haven't been well at all. Trying to live a lie will destroy you. For the past two years, I have been through hell. I asked God to come into my life and he did. I have a peace that I have never known and I want to live for God and I am going to live for God. That's why I want to correct the wrong I've done you and Sonny [Andrew Weddington Craig] by going back to court and telling the truth." Miss Howie closed by inviting Mr. Anthony to have his lawyer "come and see me soon." (D.E. 1, H1/28/85, 8-9).

In her testimony of the hearing, Miss Howie reaffirmed that she and petitioners had all been involved in robbing both Ritches. (H1/28/85, 15-18). Crucially, however, she now

maintained that only she had stabbed Mrs. Ritch (H1/28/85, 6-7, 13) and did not retreat from this account notwithstanding rough cross-examination (See, e.g., H1/28/85, 29).[3]

Denying that she was testifying now in petitioners' behalf because of her friendship for Velma Barfield, who had been executed in North Carolina, and (the prosecution suggested) a consequent desire to prevent petitioners' execution (H1/28/85, 33-35), Miss Howie stood firm in her insistence that she wanted to undo the wrong she had committed by lying at the trial:

> I wrote that letter because I asked God to come into my life and it was all the old -- all the pain that I had been going through. It was something that I can't explain to you. It's unexplainable but I know it was God that moved in my heart and gave me that change of heart and I began to -- it was like this loud voice kept telling me, if you have done your brother wrong, leave your guilt at the altar and go and correct that wrong. I'm going to tell the truth. (H1/28/85, 9-10).
>
> ... I was trying to live with a lie and no one knows it better than I myself and God what it has done to me, what it has taken me through. (H1/28/85, 35).

In addition, Miss Howie stated that she had consulted with her "counselor and minister" before taking the serious step of revealing her prior perjurious testimony and was testifying at the hearing over the objections of her family. (H1/28/85, 12-13). Her lawyer, Phillip G. Carroll, who had been appointed to represent Miss Howie in connection with this proceeding, made plain that he had "extensive conversations" with his client and

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[3]She admitted not only the basic perjury -- her trial testimony implicating Mr. Craig and Mr. Anthony in the stabbing, but also various related lies that she had told in support of that story -- e.g., regarding petitioners' alleged statements in the car. (H1/28/85, 28).

"advised her not to testify" because of the dangers to which that course would undoubtedly expose her, including potential reopen ng of the murder charge:

> [I] have also advised her that there is very much of a likelihood that there would be further criminal charges should she testify, namely, the possibility of perjury and a reconsideration of other criminal proceedings that have already been heard in the past ... . (H1/28/85, 4).

Miss Howie confirmed that Mr.Carroll had, indeed, so warned her and that she decided to testify anyway, (H1/28/85, 5).

D. The Superior Court's Opinion Denying Petitioners' Motion for Appropriate Relief.

In its findings of fact, the Superior Court briefly recounted Miss Howie's testimony at the motion hearing and noted that her trial testimony had been consistent with earlier statements she had made to the authorities and her original attorney. (Order of 5/6/86, 1-2).

"As a matter of law", the court concluded that her new testimony was "probably not true" and in some (unspecified) instances, "incredible." (Order of 5/6/86, 2). The court further concluded that Miss Howie's hearing testimony would still make out felony murder by all of the defendants and that "the evidence clearly shows that each of the three attempted to kill, or participated in the killing, or intended it, or contemplated that life may be taken in the commission of the felony robbery." (Order of 5/6/86, 3).

Lastly, the court concluded that the newly-discovered evidence, Betty Jean Howie's changed testimony, was "not of such

nature that a different result would probably be reached at a new trial." (Order of 5/6/86, 3). The court, therefore, denied relief.[4]

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

In connection with their motion for appropriate relief, petitioners argued to both courts below that refusal to overturn their sentences would violate both the specific dictates of Enmund v. Florida, 458 U.S. 782 (1982) (recently fleshed out in Tison v. Arizona, ___ U.S. ___, 55 U.S.L.W. 4496 (U.S. Apr. 21, 1987)) and the general requirements of heightened reliability

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[4]Under North Carolina law, an applicant for a new trial must generally show that :

(1) the witness or witnesses will give newly discovered evidence;

(2) the newly discovered evidence is probably true;

(3) the evidence is material, competent and relevant;

(4) due diligence was used and proper means were employed to procure the testimony at trial;

(5) the newly discovered evidence is not merely cumulative or corroborative;

(6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and

(7) the evidence is of such a nature that a different result will probably be reached at a new trial.

State v. Martin, 40 N.C. App. 408, 411, 252 S.E. 2d 859, 861 (1979). See State v. Beaver, 291 N.C. 137, 143, 229 S.E. 2d 179, 183 (1976); State v. Casey, 201 N.C. 620, 624, 161 S.E. 81, 83-84 (1931); N.C.G.S. 15A-1415(b)(6).

It is undisputed that, as a matter of local law, petitioners established all but the second and seventh of these requisites.

this Court has imposed on capital sentencing.[5] The Superior Court of Cabarrus County rejected their argument on the merits, and the Supreme Court of North Carolina denied review.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE STATE COURTS' REFUSAL TO OVERTURN PETITIONERS' SENTENCES OF DEATH, IN THE FACE OF A POST-TRIAL RECANTATION OF THE ONLY TESTIMONY SUPPORTING THOSE SENTENCES, VIOLATED BOTH THE SUBSTANTIVE STANDARDS OF ENMUND AND TISON AND THE OFT-STATED PROCEDURAL REQUIREMENT OF RELIABILITY IN CAPITAL SENTENCING.

The North Carolina Superior Court's conclusion of law that Betty Jean Howie's new evidence wholly exonerating petitioners of any participation in the stabbing-murder of Edith Ritch would not have charged the result in their case directly conflicts with this Court's pronouncements in Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, ___ U.S. ___, 55 U.S.L.W. 4496 (U.S. Apr. 21, 1987). Miss Howie was the only eyewitness to the murder. Without her testimony that Mr. Craig and Mr. Anthony took part in stabbing Mrs. Ritch, the jurors would have had no basis for finding petitioners guilty of intentional murder. Although Miss Howie's revised version of the circumstances surrounding the killing might not necessarily render invalid petitioners' convictions of felony-murder (on the view that they all acted in concert in robbing the woman), it does leave the capital sentences without support as a matter of law and thus would inevitably change those sentences.

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[5]See, e.g., Memorandum of Law in Support of Motion for a Stay of Execution and Motion for Appropriate Relief at 19-21; Petition for Writ of Certiorari [to the Supreme Court of North Carolina] at 11, 14-16 & n. 9, 19.

That is so because under Enmund the death penalty may not be imposed except on evidence that a defendant himself either "killed, attempted to kill, or intended that a killing take place." Id., 458 U.S. at 797. Ms. Howie's admission that she alone knifed Mrs. Ritch rendered the record plainly inadequate to ground the required findings of intent and personal involvement by petitioners. Nor does the recent Tison decision, in which the Court further clarified Enmund,[6] detract from the merits of petitioners' claim. Although Mr. Craig's and Mr. Anthony's complicity in robbing Edith Ritch would probably satisfy the "conduct" prong of Tison's holding, requiring "major participation" in the underlying felony, it is by no means clear that their mental attitude fulfilled the second, "state of mind" prong -- requiring, if not intent to kill, at least "reckless indifference to human life." See supra at p. ___ n. 5.[7]

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[6]In Tison, Justice O'Connor wrote for a majority of the Court:

> We will not attempt to precisely delineate the particular types of conduct and states of mind warrant'ng imposition of the death penalty here. Rather, we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement.

55 U.S.L.W. at 4502 (footnote omitted).

[7]Miss Howie has now depicted the killing as a senseless "frolic and detour" of her own, unrelated to accomplishing the robbery -- which was, in any event, completed. See Tison, 55 U.S.L.W. at 4504 & n. 4 (Brennan, Marshall, Blackmun & Stevens, JJ., dissenting); cf. id. at 4500 (majority noted elaborate planning of underlying felony, including Tison brothers' provision of "arsenal of lethal weapons" for escape, and Raymond Tison's admission that "he was prepared to kill").

But regardless whether Miss Howie's corrected account would suffice to sustain the penalty of death for petitioners, had a jury or judge found the requisite recklessness under the correct Eighth Amendment standard, in denying the motion for appropriate relief the Superior Court relied on a finding "that the evidence clearly shows that each of the three defendants attempted to kill, or participated in the killing, or intended it, or contemplated that life may be taken in the commission of the felony robbery." (Order of 5/8/86, 3)(emphasis added). That standard was impermissible.

Significantly, the test laid down by the Arizona Supreme Court, in its attempt in Tison to reformulate the concept of intent to kill as a "species of foreseeability," read as follows:

> "Intend [sic] to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony."

55 U.S.L.W. at 4498, quoting State v. (Raymond Curtis) Tison, 142 Ariz. 454, 456, 690 P.2d 755, 757 (1984). This Court squarely rejected that test as too broad to furnish a permissible basis for imposition of the ultimate penalty since it constituted "little more than a restatement of the felony-murder rule itself." 55 U.S.L.W. at 4500. Comparison of the underscored passages in the above-quoted state opinions, however (Arizona's and North Carolina's here), plainly reveals their virtual identity. Thus, if Miss Howie's present testimony had been given

at petitioners' murder trial, there is no question that the instant case -- with its blatant error on a life-or death issue -- would have warranted a grant of certiorari and, at a minimum, a remand to the state courts for findings on petitioners' mens rea premised on the proper constitutional standard. See Cabana v. Bullock, 474 U.S. 376 (1986).

Yet petitioners' rights have no less been violated simply because the North Carolina courts permitted their sentences of death to remain undisturbed when the evidence impugning those sentences surfaced after, rather than at, their trial. Simply stated, this case poses the following extremely disturbing question: "In the face of a sworn recantation from the only witness whose trial testimony provided support for the capital sentences, can we be confident that there has been a reliable, factual determination of petitioners' personal involvement in the murder sufficient to warrant public confidence in the outcome as they proceed to the gas chamber?" See Dobbert v. Wainwright, 468 U.S. 1231, 1238 (1984) (Brennan and Marshall, JJ., dissenting from denial of certiorari). The answer would clearly appear to be "no," for the reasons we discuss below. On a more general level, moreover, petitioners' plight affords the Court an eminently suitable opportunity to consider the important, unsettled issue of whether heightened Eighth Amendment scrutiny, already applied to procedural rules at both the guilt and penalty

phases of capital proceedings,[8] should be extended to rules governing post-conviction reconsideration of facts undergirding a sentence of death. See Dobbert, 468 U.S. at 1234 (Brennan and Marshall, JJ. dissenting from denial of certiorari).

Initially, it is worth stressing that a number of factors lend credence to Miss Howie's later account, as opposed to her trial version of the murder. First, as an admitted participant (unlike petitioners) in the killing as well as the robberies, Miss Howie at the time had strong motivations to spread the blame in order to avoid the death penalty and get the "deal" she actually received -- a plea to murder in the second degree and a life sentence. As Judge McKay of the Court of Appeals for the Tenth Circuit so wisely wrote:

> When dealing with this kind of witness, oft-repeated dictum that recanted testimony is generally looked upon with downright suspicion [citation omitted] seems as inapplicable as it is unjustified in the cases which recite it. The temptation to perjure in the first instance to satisfy the government, which controls future prosecution and sentencing, is so great that the suspicion of original testimony ought at least to have equal dignity with the suspicion of recanted testimony.

United States v. Ramsey, 726 F.2d 601, 606 (10th Cir. 1984)(McKay, J. concurring and dissenting)(emphasis added), cert. denied, ___ U.S. ___, 106 S.Ct. 851[illegible](1985).

Second, in describing her decision to tell the truth at last, Miss How e gave a believable reason for the change of heart that led to the change in her testimony: "... I asked God to come

[8] See, e.g., California v. Ramos, 463 U.S. 992, 998-99 (1983); Beck v. Alabama, 447 U.S. 625, 638 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

into my life." At the hearing on the motion for appropriate relief, the state never succeeded in impugning the sincerity of Ms. Howie's "religious awakening." (H1/28/85, 33). Third--just as by testifying against petitioners, Miss Howie stood to gain her life -- by recanting, and speaking in their behalf, she placed herself in substantial jeopardy. As her lawyer had warned, she seriously risked prosecution for perjury, N.C.G.S. 14-209, conviction of which would have added as much as ten years to her term. N.C.G.S. 14-1.1(a)(8). Again, Judge McKay put the point in a nutshell:

> The fact that the witness was subject to the penalties of perjury is [sic] his original testimony is not equal in weight to the fact that in the recanted testimony, he has explicitly made the government's case against him if it chooses to prosecute him for perjury.

United States v. Ramsey, 726 F.2d at 606 (McKay, J concurring and dissenting.).[9]

[9] Unlike her original story, too, Miss Howie's revised testimony was a true declaration against penal interest; in contrast to her testimony against petitioners, in exchange for which she was promised her life, the recantation could only harm her. The Court has acknowledged the reliability of such declarations on many occasions. See, e.g., Green v. Georgia, 442 U.S. 95 (1979)(per curiam); Chambers v. Mississippi, 410 U.S. 284 (1973); United States v. Harris, 403 U.S. 573 (1971).

Also significant is the fact that Miss Howie, a young woman, could have served her sentence on the murder charge by the age of 40. (H1/28/85, 5-6). See N.C.G.S. 15A-1371 (a1)(parole eligibility on life term after serving 20 years). The prospect of another decade in prison cannot be thus dismissed as inconsequential. Further, as her lawyer expressly warned, recantation could expose Miss Howie to nullification of her favorable plea and revival of the capital charge. Compare Brown v. State, 367 So.2d 616 (Fla. 1979)(revival does not constitute double jeopardy) with Adamson v. Ricketts, 789 F.2d 722 (9th Cir. 1986)(en banc)(contra), cert. granted, ___ U.S. ___, 107 S.Ct. 62 (1986).

Fourth, there was noting about the recantation itself or the circumstances surround ng it to warrant a court's discounting its substance as did the Superior Court in this case, without explanation, as "probably not true as a matter of law" and in some (unnamed) instances, "incredible." (Order of 5/6/86, 2). The state offered noth ng to rebut Miss Howie's assertion at the hearing that neither Mr. Anthony nor Mr. Craig had solicited the letter in which she offered to undo her perjury, and her testimony, pursuant to the letter, stands firm and unrepudiated.

Notably, the Superior Court's brief opinion ignored controlling North Carolina Supreme Court precedent that a judge may not substitute his judgment for that of the jury in declining to order a new trial where a witness who has furnished essential testimony against a defendant recants, and thereby leaves the judgment unsupported by sufficient evidence. State v. Ellers, 234 N.C. 42, 65 S.E.2d 503 (1951). That principle makes eminent sense: "Only the jury can determine what it would do on a different body of evidence." Mesarosh v. United States, 352 U.S. 1, 12 (1956). Not surprisingly, therefore, a number of other jurisdictions have also adopted the Ellers approach, insisting that a new trial be afforded a defendant whose conviction rests on the now-recanting witness' testimony.[10]

[10] See, e.g., State v. Rolax, 84 Wash. 2d 836, 529 P.2d 1078 (1974); Solis v. State, 267 So. 2d 9 (Fla. App. 1972); People v. Smallwood, 306 Mich. 49, 10 N.W. 2d 303 (1943); Douglas v. State, 122 Tex. Crim. 171, 54 S.W.2d 515 (1932); cf. Mollica v. State, 374 So. 2d 1022 (Fla. App. 1979)(per curiam)(refusing to apply Solis where witness repudiated recantation, which he said had been procured by threats). See also United States v. Ramsey,

For present purposes, however, the critical consideration is that proper respect for the Court's oft-stated concern for heightened reliability in capital cases demands a more intensive scrutiny of standards and practices governing the right to a new guilt or penalty proceeding when a state's witness whose evidence is vital to the sentence of death recants after the trial has ended. Even outside the capital setting, several Court of Appeals opinions have expressed the view that a conviction supported by perjured testimony cannot stand consistently with due process of law, regardless whether any prosecutor or judge knew or should have know of the falsity of the crucial evidence. See, e.g., Grace v. Butterworth, 586 F.2d 878, 880 (1st Cir. 1978); United States ex rel. Sostre v. Festa, 513 F.2d 1313 (2d Cir.), cert. denied, 423 U.S. 841 (1975); cf. Jackson v. Virginia, 443 U.S. 307(1979)(due process requires habeas courts to assess evidentiary sufficiency challenges by standard of proof beyond reasonable doubt). Two justices of this Court, moreover, have recently noted the substantiality of the claim that the Eighth and Fourteenth Amendments may call for reconsideration in capital proceedings of prevailing rules on recanted testimony, which (like North Carolina's) can operate in practical terms to

supra, 726 F. 2d at 506 (McKay, J., concurring and dissenting)(where the "critical witness' recants, great danger of erroneous conviction exists if the verdict is permitted to stand); Commonwealth v. Mosteller, 446 Pa. 83, 284 A.2d 786 (1971)(new trial granted where recantation by sole witness was declaration against penal interest); cf. United States v. Atkinson, 429 F. Supp. 880 (E.D.N.C. 1977)(conviction vacated where new evidence gravely impugned credibility of key government witness).

insulate wholly untrustworthy judgments. See Dobbert v. Wainwright, supra, 468 U.S. 1233-35 (Brennan and Marshall, JJ., dissenting from denial of certiorari).[11] The Court as a whole should postpone no longer the important task of clarifying the standards governing the right to at least a new penalty trial where an essential prosecution witness recants following a sentence of death.

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[11]For instance, here the Superior Court summarily concluded that Miss Howie's testimony was probably untrue as a matter of law, despite all indications to the contrary. See supra at pp.___. Even had the judge made a factual rather than legal finding, it would not merit the court's deference since the record does not fairly support it. Cf. 28 U.S.C. 2254(d), Sumner v. Mata, 449 U.S. 539 (1981)(review of state-court findings of fact in federal habeas corpus proceedings). "In the face of a specific recantation of critical testimony, a court must evaluate the recantation itself and explain what it is about the recantation that warrants a conclusion that it is not credible evidence." Dobbert v. Wainwright, supra, 468 U.S. 1235-36 (Brennan and Marshall, JJ. dissenting from denial of certiorari). In any event, after plenary consideration of the question, the Court might decide that in circumstances like those presented a jury, not a post-conviction judge, must determine whether the revised or original account is true.

CONCLUSION

The writ of certiorari should be granted to consider the significant claim of constitutional error presented by these capitally sentenced petitiorers.

Date: June 4th, 1987

Respectfully submitted,

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VERIFICATIONS

NORTH CAROLINA

CABARRUS COUNTY

I, W. Erwin Spainhour, having been first duly sworn upon oath, depose and say that I am attorney for the petitioner, Andrew Weddington Craig, that I have read the annexed Petition for Writ of Certiorari, and that I verify that the statements contained therein are true to the best of my own knowledge, information and belief.

W. Erwin Spainhour
Attorney for Andrew Weddington Craig

Subscribed and sworn to before me this 4th day of June, 1987.

Barbara M. Pressley
Notary Public

My commission expires: 6-25-87

OFFICIAL SEAL
BARBARA M. PRESSLEY
NOTARY PUBLIC—NORTH CAROLINA
COUNTY OF CABARRUS

NEW YORK

New York COUNTY

I, Vivian Berger, having been first duly sworn upon oath, depose and say that I am one of the attorneys for the petitioner, Francis Marion Anthony, that I have read the annexed Petition for Writ of Certiorari, and that I verify that the statements contained therein are true to the best of my own knowledge, information and belief.

Vivian Berger
Attorney for Francis Marion Anthony

Subscribed and sworn to before me this 1st day of May, 1987.

Harriet Rabb
Notary Public

My commission expires: 11-30-87

HARRIET RABB
Notary Public, State of New York
No. 31-8475460
Qualified in New York County
Term Expires 11-30-87

CERTIFICATE OF SERVICE

I, W. Erwin Spainhour, attorney for the defendant, Andrew Weddington Craig, do hereby certify that service of the within and foregoing Petition for Writ of Certiorari was made upon Honorable James E. Roberts, District Attorney, and to the Honorable Lacy Thornburg, Attorney General for the State of North Carolina, by enclosing a true copy thereof in an envelope addressed to the Honorable James E. Roberts, District Attorney, Cabarrus County Courthouse, Concord, North Carolina 28025, and Honorable Lacy Thornburg, Attorney General for the State of North Carolina, Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, postage prepaid, and depositing the same in the United States mail at Concord, North Carolina, on the 4th day of June, 1987.

W. Erwin Spainhour

W. Erwin Spainhour
Attorney for the Petitioner
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APPENDIX

STATE OF NORTH CAROLINA)
)
COUNTY OF CABARRUS)

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA)
)
Vs.) Nos. 81 CRS 9847
)
ANDREW WEDDINGTON CRAIG,) 81 CRS 10041
Defendant.) 81 CRS 10042
.....)
STATE OF NORTH CAROLINA)
)
Vs.) Nos. 81 CRS 9846
)
FRANCIS MARION ANTHONY,) 81 CRS 10039
Defendant.) 81 CRS 10040

O R D E R

This proceeding was initiated by the filing of a motion for appropriate relief on the 1st day of December, 1984. The trial complained of was held in the Superior Court of Cabarrus County, with judgment entered against each defendant on the 3rd day of March, 1982. Each defendant was convicted of murder in the first degree and sentenced to death. The defendants, through counsel, jointly filed the motion for appropriate relief.

That the basis for the motion for appropriate relief is based on the theory of newly discovered evidence in that one Betty Jean Howie allegedly recants her testimony given in the original trial.

The Court heard the evidence of the petitioners, the arguments of their attorneys, the evidence of the State, and the argument of the District Attorney. Each side stated that it had no other evidence to present.

From consideration of all the competent evidence, and after considering the arguments of counsel, the Court finds by a preponderance of the evidence that:

1. That each defendant was personally present in open Court and each was represented by the same attorney who represented him in the original trial.

2. That the Court has had an opportunity to see and observe the witness, Betty Jean Howie, on the stand and has determined what weight and credibility to give her testimony.

3. That the original statement of the witness, Betty Jean Howie, was made on August 24, 1981, to a deputy sheriff and a State Bureau of

Investigation agent, said statement being made in writing and signed by Betty Jean Howie, and made shortly after she was taken into custody. That the statement of Betty Jean Howie was made knowingly, voluntarily, and freely given after she was properly advised of her constitutional rights with regards to self incrimination. That no promise, offer of reward, or other inducements were made to Howie to obtain her statement.

4. That the witness, Betty Jean Howie, shortly thereafter gave the same statement of the crimes to her attorney.

5. That the witness, Betty Jean Howie, gave identical testimony in the trial of the defendants herein.

6. That the witness, Betty Jean Howie, gave the first indication of any desire to change or recant her testimony on November 23, 1983, by means of a letter to the defendant, Francis Marion Anthony. That this occurred more than 2 years after her original statement.

7. That at the motion hearing Howie testified that all three defendants, that is, Howie, Anthony and Craig, beat, kicked and stomped the female victim Sarah Ritch, robbed him and left him for dead. That they then proceeded to the truck where the female victim Edith Ritch, was drug from the truck, beaten, stomped and stabbed 37 times, and killed. That Francis Marion Anthony beat and stomped the female victim. That Sonny Craig gave her the knife after he cut the battery cable with it, and she then used the knife to stab the female victim to death. That Craig took the battery while the kicking and stomping was occurring. That Francis Marion Anthony took the converter out of the car. That Howie took the pocketbook of the female victim.

8. That the trial Judge charged the jury on acting in concert in the perpetration of robbery or murder, with a common purpose to commit robbery or murder.

9. That the jury in its verdict found each defendant guilty of murder in the first degree under the felony murder rule, as well as murder in the first degree on the basis of malice, premeditation and deliberation.

Upon the foregoing findings of fact, the Court concludes as a matter of law:

1. That the evidence given by the witness, Betty Jean Howie, at the motion hearing wherein it differs from her testimony at the trial is probably not true. That in some instances her testimony is incredible

2. That the testimony of Betty Jean Howie at the motion hearing, if believed, would constitute murder in the first degree by each defendant in the perpetration of a felony. That the evidence clearly shows that each of the three defendants attempted to kill, or participated in the killing, or intended it, or contemplated that life may be taken in the commission of the felony robbery. That the evidence clearly shows that each of the three defendants acted in conce

3. That the "newly discovered evidence", that is, the change of testimony by Betty Jean Howie, would not have any reasonable likelihood of affecting the jury verdict.

4. That the "newly discovered evidence", is not of such nature that a different result would probably be reached at a new trial.

5. That the defendants are not entitled to a new trial.

IT IS NOW, THEREFORE, ORDERED that the motion of the defendants for a new trial is denied.

This the 2nd day of April, 1986.

Judge of the Superior Court

A TRUE COPY
ESTUS E. WHITE
CLERK SUPERIOR COURT
By _____
Assistant Clerk Superior Court

No. 357A82 NINETEEN-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA
v
ANDREW WEDDINGTON CRAIG and
FRANCIS MARION ANTHONY

From Cabarrus

ORDER

Upon consideration of the petition filed by Defendants in this matter for a writ of certiorari to review the Superior Court, Cabarrus County, the following order was entered and is hereby certified to the Superior Court of that County:

"Denied by order of the Court in conference, this the 7th day of April 1987.

s/ Whichard, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of April 1987.

J. GREGORY WALLACE
Clerk of the Supreme Court

Assistant Clerk

Copy to:
Mr. W. Erwin Spainhour, Attorney at Law,
For the Defendant (Craig)
Mr. James C. Johnson, Jr., Attorney at Law,
For the Defendant (Anthony)
Mr. William N. Farrell, Jr., Special Deputy Attorney General,
For the State
Ms. Vivian Berger, Attorney at Law,
For the Defendant (Anthony)
Mr. Robert S. Mahler, Attorney at Law,
For the Defendant (Anthony)

Mr. Estus B. White, Clerk of Superior Court
Mr. James E Roberts, District Attorney
Mr. Ralph A. White, Appellate Court Reporter
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CABARRUS COUNTY, C.S.C.

By _____

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IN THE OFFICE OF THE CLERK SUPREME COURT OF NORTH CAROLINA

IN THE SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)
)
v.)
)
ANDREW WEDDINGTON CRAIG)

No. 257A82 - Cabarrus

STATE OF NORTH CAROLINA)
)
v.)
)
FRANCIS MARION ANTHONY)

On appeal by both defendants as a matter of right from the judgments of Seay, Judge, entered at the 22 February 1982 Session of Superior Court, Cabarrus County. Both defendants were charged in indictments, proper in form, with the murder of Edith Davis Ritch, with robbery with a dangerous weapon of Edith Davis Ritch and with the common law robbery of Seab Albert Ritch. The jury returned verdicts of guilty on each charge as to each defendant and recommended the sentence of death for both defendants for their first degree murder convictions. Judge Seay imposed a forty year sentence against each defendant for robbery with a dangerous weapon, each sentence to run consecutively to the sentence imposed for the first degree murder of Edith Ritch. Judge Seay also imposed a ten year sentence against each defendant for the common law robbery of Seab Ritch with the sentences to run consecutively to the sentences imposed for the robbery with a dangerous weapon conviction. Judge Seay ordered the imposition of the death penalty against each defendant for

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the first degree murder of Edith Ritch. On 24 November 1982 we granted the defendants' motions to by-pass the Court of Appeals on the common law robbery and robbery with a dangerous weapon convictions.

In relevant part the State's evidence tended to show the following: Seab and Edith, husband and wife, left their home in Concord on 3 July 1981 and went to a friend's home in Charlotte for the purpose of drinking alcoholic beverages. The Ritches drank heavily from 3 July 1981 until 8 July 1981, at which time they decided to return to their home in Concord. Seab and Edith Ritch consumed large quantities of intoxicants on 8 July 1981 and on their way home decided to stop under a bridge on the Rocky River Road in order to finish drinking a bottle of vodka. After stopping at the bridge Seab Ritch left his vehicle, walked down to the river's edge where a man was fishing and offered the man a drink. At this time Edith Ritch was in the passenger's seat of the Ritch vehicle.

After a while five persons, including the defendants, began fishing on the opposite side of the river from where Seab Ritch was located. There was some conversation across the river causing the defendants and Betty Howie to come over to where Seab Ritch was sitting for the purpose of getting a drink. After drinking Mr. Ritch's vodka the defendants attacked and beat Mr. Ritch and took from his possession a wallet, some cash and a pocket knife. When this was completed they descended upon Edith Ritch who was extremely intoxicated with a blood alcohol level of at least .29. After telling the defendants that she had no money Edith Ritch was jerked from her vehicle and thrown to the ground.

The defendant Craig took the pocket knife obtained from Seab Ritch and began stabbing Edith Ritch as she begged him not to kill her. After repeatedly stabbing the victim the defendant Craig handed the knife to Betty Jean Howie, an accomplice, who testified on behalf of the State pursuant to a plea bargain. She stabbed the victim repeatedly in the abdomen. Then the defendant Anthony took the knife and stabbed Edith Ritch until death ensued. In all Edith Ritch was stabbed thirty seven times.

Before leaving the scene the defendants removed from the Ritch vehicle Edith Ritch's pocketbook, an F.M. radio converter and the truck's battery. The defendants left in a car driven by Betty Jean Howie's brother, Bobby Howie, who was not involved in either incident. The defendant Craig was arrested for murder on 10 July 1981 and defendant Anthony was arrested for murder on 12 July 1981.

The defendants did not present any evidence during the guilt phase of the trial.

At the end of all the evidence the jury found each defendant guilty of first degree murder, robbery with a dangerous weapon and common law robbery.

At the sentencing hearing for the first degree murder convictions the State relied on its evidence presented during the guilt determination of the trial and did not present any additional evidence. In each case the State relied on three circumstances in aggravation: (1) That the murder was committed for pecuniary gain, (2) that the murder was especially heinous, atrocious and cruel and (3) that the murder was part of a course

of conduct in which other crimes of violence were committed against other persons by each defendant.

The defendant Francis Marion Anthony did not present any evidence at the sentencing phase of this trial. In his case the court in mitigation submitted to the jury: (1) That Anthony had no significant history of prior criminal activity and (2) that the jury should consider any other circumstance or circumstances arising from the evidence which is deemed to have mitigating value. The jury unanimously found the existence of all three aggravating circumstances, found the existence of at least one mitigating circumstance and found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. Thereupon, the jury recommended and the court so ordered the imposition of the death penalty.

The defendant Andrew Weddington Craig offered the testimony of his mother during the sentencing phase of the trial in order to show that he supported his wife, attended church and was a good son. In his case the court in mitigation submitted four circumstances for the jury's consideration. The jury unanimously found the existence of all three aggravating circumstances, found the existence of at least one mitigating circumstance and found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. As a result the jury recommended and the court so ordered the imposition of the death penalty.

Additional facts relevant to the defendants' assignments of error will be incorporated into the opinion.

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RUFUS L. EDMISTEN, Attorney General, by Assistant Attorney General CHARLES M. HENSEY, for the State.

W. ERWIN SPAINHOUR, for the defendant-appellant Andrew Weddington Craig.

JAMES C. JOHNSON, JR., for the defendant-appellant Francis Marion Anthony.

COPELAND, Justice.

GUILT PHASE - CRAIG

I.

In his first argument the defendant, Craig, contends that the trial court erred by denying his motion for a polygraph examination to be conducted by the State Bureau of Investigation at the expense of the State. The defendant maintains that by refusing his request the trial court denied him a valuable tool which could have bolstered his credibility at trial and would have aided his attorney's preparation of his defense. The defendant has failed to demonstrate how the trial court's denial of his motion was error.

In the first instance the defendant's credibility was never in issue at trial because he did not testify. In addition the results of a polygraph test could not have been admitted into evidence for any purpose absent a stipulated agreement between the defendant and the State. State v. Milano, 297 N.C. 485, 256 S.E. 2d 154 (1979). Neither the record nor the briefs indicate that a stipulation was entered into concerning the admissibility of polygraph test results. Therefore the polygraph test results, even if available and helpful, would not have been admissible to bolster the defendant's credibility. Secondly, the defendant, in requesting the polygraph test results for the purpose of

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preparing his defense, is asserting that he, as an indigent, is entitled to state financed expert assistance. In State v. Gray, 292 N.C. 270, 233 S.E. 2d 905 (1977), we held that expert assistance need only be provided by the State when the defendant can show that it is probable that he will not receive a fair trial without the requested assistance. The defendant fails to explain and we do not see how the polygraph test would have aided the preparation of his defense. We, therefore, find no error. We note that the trial in this case took place prior to our decision in State v. Grier, ___ N.C. ___, 300 S. E. 2d 351 (1983), in which we held that polygraph evidence was no longer admissible at trial in any case, and thus would be of no assistance to him upon retrial.

II.

During the jury selection process after the first twelve jurors were seated the trial judge made some introductory remarks including the following:

> The defendant, Andrew Weddington had (sic) also come into Court and has entered a plea of guilty to a charge that on July 8, 1981, he did commit Common Law Robbery in that he did, with force, assault Seab Albert Ritch, put him in fear, and that he did then unlawfully and feloniously take and carry Mr. Ritch's property valued at $14.00, being a man's wallet with $4.25 in currency.

The defendant Craig contends that this statement by the trial judge was an expressed opinion as to the defendant's guilt since he had in fact pleaded not guilty to the charge of common law robbery. We find the trial court's statement to be merely a lapsus linguae not constituting prejudicial error. State v. Poole, 305 N.C. 308, 289 S.E. 2d 335 (1982). Although the above

statement was part of an introductory comment by the trial judge, it should be considered within the context of all the introductory remarks. This is the method for reviewing jury charges, State v. Poole, supra, and should be applicable to opening remarks. In reviewing the entire statement made to the prospective jurors we find that prior to this unfortunate slip of the tongue the judge told the jurors that both defendants pleaded not guilty to all charges. In addition, at the end of his opening remarks the trial judge reminded the prospective jurors that each defendant is presumed innocent as a result of his pleas of not guilty. The reference to defendant Craig's plea of guilty was not repeated and appears from the record to be totally accidental. In fact defense counsel did not attempt to have this remark corrected and this lapus linguae might very well have gone unnoticed until counsel began preparing his record on appeal. We, therefore, find no prejudice to the defendant and overrule this assignment of error.

III.

Defendant Craig next assigns as error the trial court's decision to sustain the State's challenge for cause of prospective juror Mrs. Forrester. The defendant maintains that although Mrs. Forrester unequivocally stated that she would not impose the death penalty she could not be properly challenged for cause because the prosecutor and the court led her to that conclusion. In reviewing Mrs. Forrester's responses in their entirety, it appears that her initial response that she did not think she could vote for the death penalty would have been sufficient to sustain a challenge for cause. State v. Williams,

305 N.C. 656, 292 S.E. 2d 243 (1982), cert. denied, ___ U.S. ___, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982). As noted in our recent decision of State v. Kirkley, ___ N.C. ___, ___ S.E. 2d ___(filed 3 May 1983), the trial judge must view the juror's demeanor and responses in determining the degree of conviction in the prospective juror's answers. The trial judge in this case, through an abundance of caution, wanted the juror to give a clear "yes" or "no" answer. Not once throughout her examination did Mrs. Forrester indicate that she might vote for the death sentence under any circumstance. We find no violation of the rule established by the Supreme Court of the United States in Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968). This assignment of error is overruled.

IV.

During the State's case in chief, Betty Jean Howie testified to the facts and circumstances surrounding her involvement in and the defendants' participation in the robbing of Seab Ritch and the stabbing of his wife Edith Ritch. In corroboration of Betty Howie's testimony the State offered as evidence a statement given to Special Agent Barry M. Lea of the State Bureau of Investigation by Betty Howie on 24 August 1981, approximately six weeks after the alleged incidents. The statement was read to the jury by Mr. Lea. The defendant objected to the statement "Sonny said, 'Let's rob the mother ------'" on the grounds that it did not corroborate Betty Howie's testimony. The trial judge sustained the objection and instructed the jury to strike that statement from their recollection of the evidence. The defendant assigns as error the

inferences drawn from them. . . ." State v. Kirkley, ___ N.C. ___, ___ S. E. 2d ___ (slip opinion p. 19 (1983); State v. Monk, 286 N.C. 509, 212 S. E. 2d 125 (1975).

The defendant failed to object to the closing argument and therefore may now only assert that the trial judge should have corrected the argument ex mero motu. In a case where the defendant fails to object to the State's closing argument the standard of review is one of gross impropriety. State v. Kirkley, ___ N.C. ___, ___ S.E. 2d ___ (filed 3 May 1983, p. 19); State v. Johnson, 298 N.C. 355, 259 S.E. 2d 752 (1979).

The defendant's basis for this assignment of error is that one of the State's own expert witnesses was unable to testify that shoes belonging to the defendant had any relation to the murder. As a result the defendant contends that the prosecutor should not have argued to the jury that the physical evidence supported the conclusion that the defendant's shoes made a mark on the deceased victim's neck. The record reveals that the expert witness to which the defendant refers was qualified only as an expert in fingerprint identification. The fact that a fingerprint expert was unable to connect the shoes to the murder does not preclude the conclusion that the prosecutor argued to the jury. The evidence presented, including the testimony of the State Medical Examiner, supports the inference that the defendant's shoes could have caused the circular impressions left on the neck of the deceased. The fact that no expert was called to establish this connection merely goes to the weight of the

evidence. We find no error in the State's argument and therefore no gross impropriety which would require the trial judge to act ex mero motu. This assignment of error is overruled.

VI.

The defendant Craig next asserts that the trial court erred when it failed to instruct on what the jury should do if they found the defendant not guilty. The defendant contends that the error was highlighted by the fact that the judge gave detailed instructions to the jury on how to proceed if they found the defendant guilty. "It is well established in this jurisdiction that a charge is to be construed as a whole and isolated portions of a charge will not be held prejudicial where the charge as a whole is correct and free from objection." State v. Poole, 305 N.C. 308, 324, 289 S. E. 2d 335, 345 (1982). A review of the judge's charge to the jury makes it obvious that the jury was made fully aware that they could find the defendant not guilty. The judge's instructions as a whole did not express an opinion as to the guilt or innocence of the defendant. We find no prejudice in the trial judge's instructions and therefore overrule this assignment of error.

GUILT PHASE - ANTHONY

VII.

Defendant Anthony contends that the trial court committed a prejudicial error by allowing State's witness John Howie to testify about alleged statements made by the defendants when Mr. Howie could not identify which defendant made the statements. The defendant maintains that the statements were inadmissible hearsay denying him the right to confront the

declarant. The witness, Mr. John Howie, was seated in the front seat of a car in which both defendants and Betty Jean Howie were seated in the back seat. Mr. Howie testified to and the defendants object to the following statement, "They said: 'we ------- them white folks up.'" "And then one of them said to the other, 'yea, we sure did, man.'" Mr. Howie was unable to identify who made the statements but he did testify that the statements were made by the defendants (the two males) while both were in the back seat of the car.

These statements are at least implied admissions by the defendant Anthony. State v. Spaulding, 288 N.C. 397, 219 S.E. 2d 178 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976). The test for determining whether a statement made by a co-defendant can be admitted into evidence as an implied admission was clearly stated by Justice Branch (now Chief Justice) in State v. Spaulding, supra:

> (I)f the statement is made in a person's presence by a person having firsthand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in a position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission. (Citations omitted.)

288 N.C. at 406, 219 S.E. 2d at 184. It is clear from the testimony of Mr. Howie that at least one of the two defendants made the statements objected to by defendant Anthony. It is also apparent that Anthony was able to hear the statements and did not attempt to deny his involvement. In fact, Mr. Howie's testimony indicates that the statements were made by one defendant to the

other. We therefore find that the statements testified to by Mr. Bowie were admissible against defendant Anthony at least as implied admissions. In addition, any error could not have been prejudicial because Mr. Bobby Bowie, the driver of the car, later testified to the same conversation without objection by the defendant Anthony. As a result, any benefit from the earlier objection was waived. State v. Hunter, 290 N.C. 556, 227 S.E. 2d 535 (1976), cert. denied, 429 U.S. 1093, 51 L. Ed. 2d 539, 97 S.Ct. 1106 (1977). This assignment of error is overruled.

Although defendant Anthony raised questions by his assignments of error numbers one, three and four, those questions are deemed abandoned because they were not discussed in his brief. State v. Wilson, 289 N.C. 531, 223 S.E. 2d 311 (1976). Rule 28(b)(5) of the Rules of Appellate Procedure states in part: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."

GUILT PHASE - ANTHONY AND CRAIG

VIII.

The defendants argue that they were denied a fair trial because the district attorney referred to them as "wolves" during his closing argument. Specifically the defendants object to the analogy employed by the State which compared them and their actions to a pack of wolves. The defendants failed to object to the closing argument of the prosecutor. "When a party fails to object to a closing argument we must decide whether the argument was so improper as to warrant the trial judge's intervention ex mero motu. State v. Kirkley, __N.C.__, ___ S.E. 2d ____ (filed

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3 May 1983, p. 15). The standard of review is one of "gross impropriety." State v. Johnson, 298 N.C. 355, 259 S.E. 2d 752 (1979).

The law in this jurisdiction allows counsel wide latitude in arguing to the jury. Counsel may argue the law and the facts in evidence and all reasonable inferences arising therefrom but counsel may not interject facts and personal beliefs not supported by the evidence. State v. Covington, 290 N.C. 313, 226 S.E. 2d 629 (1976); State v. Monk, 286 N.C. 509, 212 S.E. 2d 125 (1975). The defendants contend that the prosecutor was being abusive and interjecting his personal views and opinions when he compared them to a pack of wolves. We disagree with the defendants' argument.

The prosecutor's remarks were not abusive and were not an attempt to place before the jury his personal beliefs or opinions. The references to wolves and wolfpack were made to illustrate by way of analogy how concert of action leads to each of the defendants' responsibility for the murder of Edith Ritch. The analogy employed by the State is supported by the evidence presented and was phrased in a manner which was not inflamatory. As the Supreme Court of the United States has held, a prosecutor must prosecute cases in earnest and strike hard blows, although he may not strike foul ones. Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). In the case sub judice the prosecutor struck hard blows but they were not foul. As a

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result the trial court did not err by failing to intervene ex mero motu during the prosecutor's closing argument. This assignment of error is overruled.

IX.

The defendants also contend that their right to a fair trial was denied when the prosecutor made reference to a witness who was not called to testify by either the State or the defendant. The prosecutor stated:

> Michael Moss, the ten-year-old boy didn't testify nor did we put him on the stand. Why? He was there the same as Mr. Carr and the same as Mr. Johnson. He's a ten-year-old boy. The ones best able to describe it, the adult and the man that's pushing adulthood. Four years makes a difference at that time. No, we didn't call Michael Moss. Don't you know if his statement was inconsistent you would have heard from him now.

The defendants maintain that the argument improperly placed before the jury facts, to-wit, Michael Moss' testimony, not supported by the evidence and was also an improper comment on their failure to produce witnesses. Once again the defendants have failed to object to the State's argument and therefore we look to see only if the argument was grossly improper requiring the trial judge to act ex mero motu. State v. Johnson, 298 N.C. 355, 259 S.E. 2d 752 (1979). We do not find the State's argument to be grossly improper.

The State is allowed to draw the jury's attention to the fact that the defendant failed to produce evidence which contradicts the State's case. State v. Tilley, 292 N.C. 132, 232 S.E. 2d 433 (1979). "It is permissible for the prosecutor to draw the jury's attention to the failure of the defendant to

produce exculpatory testimony from witnesses available to defendant." State v. Thompson, 293 N.C. 713, 717, 239 S.E. 2d 465, 469 (1977). Accord: State v. Tilley, 292 N.C. 132, 232 S.E. 2d 433 (1977). The prosecutor's remarks in the case sub judice were intended to make the jury aware that the State had not called Michael Moss to testify because his testimony would have added nothing to its case and that its evidence was uncontradicted. This is not error. This assignment of error is overruled.

SENTENCING PHASE - CRAIG

X.

Defendant Craig contends that he was denied a fair sentencing because the prosecutor argued that Betty Jean Howie, a co-defendant who testified on behalf of the State pursuant to a plea arrangement, had no prior criminal record. The defendant maintains that the prosecutor's reference to Betty Howie's lack of a prior criminal record was not supported by the evidence and was therefore improper. State v. Monk, 286 N.C. 509, 212 S.E. 2d 125 (1975). The witness, Betty Jean Howie, was subjected to an extensive cross- examination recorded in over one hundred pages of trial transcript. The prosecutor argued that there was no evidence presented at trial which would suggest that Betty Howie had a prior criminal record. The prosecutor was merely arguing an inference which could logically arise in light of the very thorough and lengthy cross-examination conducted by the defendants. Counsel is allowed to argue all facts in evidence and all reasonable inferences which may be drawn from those

facts. State v. Kirkley, ___ N.C. ___, ___S. E. 2d ___, (filed 3 May 1983). We find no error in the prosecutor's argument and therefore overrule this assignment of error.

XI.

The defendant Craig also argues that it was error for the trial judge to instruct the jury that they could find from the evidence that the murder of Edith Ritch was especially heinous, atrocious and cruel as provided for by G.S. 15A-2000(e)(9). Defendant maintains that the evidence does not support this aggravating circumstance because the victim, with a blood alcohol level of .29, was so intoxicated that she must have been practically anesthetized against the torture of the thirty seven stab wounds inflicted with a pocket knife by the defendants. This argument is unsupported by any authority, it is meritless and we therefore overrule this assignment of error.

SENTENCING PHASE - ANTHONY

XII.

During his argument to the jury the prosecutor, in reference to the mitigating circumstances which were to be submitted, stated:

> The first circumstance alleged by each of them is that he has no signigicant history of prior criminal activity. It's incumbent on the Court to submit this to you, as our law would require. Have you heard any evidence whatever on that?

The defendant Anthony argues that it was prejudicial for the prosecutor to state; "Have you heard any evidence whatever on that?", because it was an improper comment on the existence of a statutory mitigating circumstance. At the time this statement

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was made the trial judge interrupted the prosecutor and called the parties to the bench. At this point the prosecutor corrected his statement and argued only the weight that such a mitigating factor should be afforded. In State v. Kirkley, ___ N. C. ___, ___ S.E. 2d ___ (filed 3 May 1983) we stated that the weight a mitigating circumstance is assigned is entirely for the jury to decide. It follows that counsel is entitled to argue what weight circumstances should ultimately be assigned. Any error is harmless since the trial judge peremptorily instructed the jury that this mitigating circumstance existed in the case of each defendant. This assignment of error is overruled.

XIII.

Defendant Anthony also maintains that he was prejudiced by the trial judge's instructions to the jury concerning the weighing of aggravating and mitigating circumstances. We find that the instructions in this case were clear, concise, and consistent with those instructions upheld by this Court in State v. Pinch, 306 N.C. 1, 292 S. E. 2d 203 (1982), cert. denied, ___ U. S. ___, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982) and State v. Williams, 305 N.C. 656, 292 S.E. 2d 243 (1982), cert. denied, ___ U. S. ___ 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982). We also note that defendant Anthony failed to argue this assignment of error in his brief and it is deemed abandoned pursuant to Rule 28 (b)(5) of the Rules of Appellate Procedure. We have nevertheless reviewed the instructions anyway and find no error. This assignment of error is overruled.

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SENTENCING PHASE - CRAIG AND ANTHONY

XIV.

The defendants argue that the trial court erred when it denied their motions to have the fact that they requested to take a polygraph test submitted to the jury as a mitigating circumstance. The mere fact that a defendant desires to take a polygraph test is not, standing alone, evidence of a mitigating circumstance. We have defined mitigating circumstances as:

> (A) fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first degree murder, but which may be considered as extenuating, or reducing the moral culpability of the killing or making it less deserving of the extreme punishment than other first-degree murders.

State v. Irwin, 304 N.C. 93, 104, 282 S.E. 2d 439, 446-47 (1981). The defendants contend that their own desire to take a polygraph test was some evidence from which the jury could have found as a mitigating factor their willingness to cooperate with the police. We disagree. There is no evidence that the State even suggested that the defendants take a polygraph test. A defendant's personal desire to submit to a polygraph examination, absent a police request, does not indicate a willingness to cooperate with the police. The record indicates that the request to take the polygraph test was solely self-serving. Such a request has no relevance to the question before the jury at the sentencing stage of this trial. We note that our recent decision in State v. Grier, ___ N.C. ___, 300 S. E. 2d 351 (1983) makes polygraph test results incompetent for all purposes at trial. We therefore overrule this assignment of error.

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XV.

The defendants also assert that the trial court erred by allowing the prosecutor to refer to them as "human animals" and members of a "wolfpack" during his closing argument at the sentencing phase of the trial. Although no objection was raised by either defendant, the trial judge is under a duty to act ex mero motu if the argument is grossly improper. State v. Kirkley, ___ N.C. ___, ___ S.E. 2d ___ (filed 3 May 1983); State v. Johnson, 298 N.C. 355, 259 S.E. 2d 752 (1979).

In State v. Smith, 279 N.C. 163, 181 S.E. 2d 458 (1971), this Court held that it was error for a prosecutor to characterize the defendant as "lower than the bone belly of a cur dog." 279 N.C. at 165, 181 S.E. 2d at 459. In Smith, however, the prosecutor made numerous remarks totally unsupported by the evidence. Some of the remarks in Smith concerned what the prosecutor thought about the defendant's character, that he didn't believe a word the defendant said and that he knew when a case called for the death penalty. The types of arguments proscribed by the law of this State and found as error in State v. Smith, supra, are those which place before the jury the personal beliefs or knowledge of counsel which are not supported by evidence presented at trial. State v. Kirkley, ___ N.C. ___, ___S. E. 2d ___ (filed 3 May 1983); State v. Britt, 288 N.C. 699, 220 S.E. 2d 283 (1975).

During his argument to the jury at the sentencing phase of the trial the prosecutor made the following statements:

> The course of conduct wherein Edith Ritch was killed was part of a course of conduct wherein the defendants acting as a wolfpack,

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> a group of human animals, descended first on Seab Ritch, beat him mercilessly, continued to Edith Ritch, and there added only the knife to what they had done to Seab Ritch.
>
> * * *
>
> The extreme, overwhelming heinous brutality of this act echoes through the facts. The defendants, by their premeditated, cold-blooded, wolfpack acts, called for their own punishment, their own penalty.

In each instance where the prosecutor referred to the defendants as animals, he did so for a legitimate purpose supported by the evidence. In the first above cited statement the prosecutor was arguing how the evidence supported the aggravating factor that the murder was part of a course of conduct which included the commission of crimes of violence against other people. G.S. 15A-2000(e)(11). Analogizing these defendants' acts to those of a wolfpack illustrates how each defendant was involved in this course of conduct. It was not designed to place before the jury, nor did it place before the jury, personal beliefs or knowledge not supported by the evidence. The evidence in this case clearly supports the prosecutor's analogy. In the prosecutor's second statement he was arguing that the defendants' senseless, cold-blooded actions were especially heinous, atrocious and cruel. The wolfpack analogy was supported by the evidence that Edith Ritch was extremely intoxicated, defenseless and not in any condition to identify them for their crime against her husband. Perhaps the prosecutor's analogy was a bit colorful but it was not error and was certainly not so grossly improper as would require the trial judge to act ex mero motu. We hold that the

prosecutor's closing argument during the sentencing phase of this trial did not improperly place before the jury facts, beliefs or inferences not supported by the evidence. This assignment of error is overruled.

XVI.

Pursuant to G.S. 15A-2000(d)(2) we have reviewed the record in this case in order to determine (1) whether the record supports all the aggravating circumstances upon which the jury based its sentence of death, (2) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor and (3) whether the death penalty is an excessive or disproportionate punishment in light of similar cases, considering both the defendants and the crimes. As a result of our review of the record, the transcript and the briefs in this case, we find that each aggravating circumstance found by the jury is supported by the record. We also find that the death sentence imposed against each defendant is not the product of any passion, prejudice or other arbitrary factor which would require us to overturn the sentences.

In State v. Williams, ___ N. C. ___, 301 S. E. 2d 335 (1983), we held, speaking through Justice Mitchell, that for purposes of proportionality review the case before the Court must be compared with "all cases arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court. . . ." ___ N.C. at ____, 301 S.E. 2d at 355. (Original Emphasis.) We have carefully reviewed the briefs, the record and the transcript in this case and have compared this case with all

similar cases which have been appealed to this Court. State v. Williams, ___ N.C. ___, 301 S.E. 2d 335 (1983). The record before us reveals that these defendants participated in the brutal slaying of a heavily intoxicated woman who was utterly defenseless. After beating and robbing the victim's husband the defendants directed their attention to robbing the victim, Edith Ritch. When the victim told the defendants that she had no money the defendants jerked her from her vehicle and unleashed an unprovoked, cruel and brutal attack upon her. The defendants took turns stabbing the victim with a pocket knife inflicting thirty seven wounds on her body as she begged for her life. These tortuous acts ceased only after Edith Ritch was completely and mercifully silenced by death. As the victim lay lifeless on the ground the defendants took her pocketbook and other belongings. The attack on Mrs. Ritch was carried out in an uncommonly brutal manner as the defendants willingly took turns inflicting mortal wounds. We believe that the imposition of the death penalty against each defendant is not disproportionate or excessive considering both the crime and these defendants. We therefore refuse to exercise our discretion and will not set aside the sentence of death imposed against each defendant.

In all phases of the trial below as to each defendant and as to each crime for which they were convicted we find no error.

NO ERROR.

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By Peggy M. Byrd
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20 June 83

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No. 257A82 - State v. Craig and Anthony

Justice EXUM dissenting as to sentence.

Believing most strongly that it is error entitling defendants to a new sentencing hearing for the prosecutor in argument to characterize defendants as "wolves" and "human animals," I dissent from that portion of the majority opinion which finds no error in the sentencing phase of the case.

Throughout his arguments in both the guilt and sentencing phases of the case, the prosecutor repeatedly used the metaphor of a "wolfpack" in describing the actions of defendants. He argued, for example, as follows in the guilt phase:

> As a wolfpack who chases down its quarry, who is the more responsible, the wolf that grabs the flank and holds or the wolf that grabs the neck and kills?
>
> . . . .
>
> The strength of the pack is the wolf, and the strength of the wolf is the pack.
>
> . . . [C]ould a more accurate analogy be drawn than a wolfpack? . . . Edith Ritch never left there because a pack of humans acting as wolves descended on her, as they had previously descended on Seab Ritch.
>
> . . . .
>
> Like wolves of the pack they pounced on him, Betty just as much as the rest.
>
> . . . .
>
> Once the wolfpack had begun, once the beating of Seab Ritch was started, there became a frenzy.

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Then in the sentencing phase the prosecutor continued with the metaphor:

> The course of conduct wherein Edith Ritch was killed was part of a course of conduct wherein the defendants acting as a wolfpack, a group of human animals, descended first on Seab Ritch, beat him mercilessly, continued to Edith Ritch, and there added only the knife to what they had done to Seab Ritch.
>
> . . . .
>
> The defendants, by their premeditated, cold-blooded, wolfpack acts, called for their own punishment, their own penalty. . . . Not by anything you, the Court, or any witness did, but by their own hands, by their own acts, by their own merciless, vicious brutality, do they call for the only just penalty in this case, that the penalty of death be imposed.

Both the prosecutor at trial and the majority here refer to this argument as an analogy, apparently in an effort to accord it some kind of logical force. To be valid as an analogy, the argument would have to rest on these premises: wolves run in packs; all human beings act like wolves; therefore these defendants ran in a pack. Since the minor premise is obviously invalid, the argument fails as an analogy. The argument is nothing more than a metaphor in which human beings are likened to wolves. It has no logical force, but serves only to diminish the status of defendants in the eyes of the jury.

Both this Court and the Court of Appeals have strongly disapproved of prosecutors likening defendants to the animal kingdom in the trial of criminal cases. State v. Smith, 279 N.C. 163, 181 S.E.2d 458 (1971); State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971), cert. denied, 280 N.C. 723, 186 S.E.2d 925 (1972). Smith was a capital case in which defendant was

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convicted of rape and received life imprisonment at trial upon the jury's recommendation. In closing argument the prosecutor argued, among other things, that a person who did what defendant did is "lower than the bone belly of a cur dog." 279 N.C. at 165, 181 S.E.2d at 459. The prosecutor also argued that he knew "when to ask for the death penalty and when not to"; he described a sexual assault case that he refused to prosecute; he called the defendant in argument a "liar"; and he disparaged the defendant's character witnesses. Id. at 165-66, 181 S.E.2d at 459-60. For all of these transgressions this Court, in an opinion by Justice Higgins, awarded defendant a new trial on the question of his guilt. The Court quoted with approval from Berger v. United States, 295 U.S. 78, 88 (1935), as follows:

> 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'

279 N.C. at 167, 181 S.E.2d at 460. Although no objection was made at trial to the argument, this Court said, "The trial judge who heard the argument and failed to intervene on his own motion, was derelict in his duty." Id. at 167, 181 S.E.2d at 461.

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In State v. Brown, supra, 11 N.C. App. 261, 185 S.E.2d 471, the Court of Appeals, in an opinion by then Chief Judge Mallard, expressly disapproved of the prosecutor's referring to defendant in closing argument as a "young animal," but did not under the circumstances of the case find the error sufficient to give defendant a new trial on the question of his guilt. Id. at 270, 185 S.E.2d at 477.

Other courts have also disapproved of metaphors which liken human beings to animals. In ordering a new trial in a death case on other grounds, the Louisiana Supreme Court observed, for guidance on retrial, that "[T]he prosecutor also characterized the defendant as an 'animal,' an epithet which we have previously warned may constitute reversible error." State v. Marshall, 414 So.2d 684, 688 n. 3 (La.), cert. denied, ___ U.S. ___, 103 S.Ct. 468 (1982). The Pennsylvania Supreme Court, in a capital case in which the jury fixed life imprisonment as the punishment, gave the defendant a new trial because the prosecutor, among other things, referred to defendants as "hoodlums" and "animals." Commonwealth v. Lipscomb, 455 Pa. 525, 317 A.2d 205 (1974). The Pennsylvania Court characterized such arguments as expressions of the prosecutor's personal belief in the accused's guilt which have no legitimate place in argument. Id. at 528, 317 A.2d at 207.

Although I think it error, I would not award defendants a new trial on the question of their guilt because of the animal metaphor argument. The evidence of guilt is so overwhelming and uncontradicted by defendants at trial, that the result on the guilt phase would have been the same even without this argument.

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I strongly believe, however, that such an argument requires a new sentencing hearing.

In a capital case, the jury's decision to recommend death, a "recommendation" which is binding on the trial court under our procedure, is the most awesome decision one group of human beings can make about another human being. In the trial of a case in which this decision may be made, nothing should be permitted that dilutes the jury's terrible responsibility, or as this Court has said through Justice, now Chief Justice, Branch, "lighten[s] [its] solemn burden." State v. Hines, 286 N.C. 377, 386, 211 S.E.2d 201, 207 (1975). See also State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975). In Hines and White defendants who had received death sentences at trial were given new trials by this Court. In Hines the prosecutor during the jury selection process said to one juror, "And to ease your feelings, I might say to you that [no] one has been put to death in North Carolina since 1961." 286 N.C. at 382, 211 S.E.2d at 204. White relied on Hines in finding similar reversible error in a prosecutor's argument that made reference to defendant's "automatic appeal to the Supreme Court of North Carolina . . . . If any error is made in this court, that Court will say." 286 N.C. at 402, 211 S.E.2d at 449. In White the Court found reversible error in this argument notwithstanding the trial court's sustaining defendant's objection and instructing the jury to disregard the argument.

By the same reasoning, arguments to the jury in capital cases comparing defendants to animals subtly dilutes the jury's ultimate responsibility to say whether defendant shall live or die. Defendant after all is a human being created like the

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jurors themselves by God in His own image and given dominion over all other creatures. Genesis 1:26-28; 2:4-23. In making its life or death decision the jury's focus on defendant's humanity should not be blurred. If the jury recommends death, its full realization that it is a human being whom it has condemned to die must not be weakened. To suggest to the jury by animal metaphors in a capital case that a defendant is something less than human impermissibly deprives defendant of that status in the order of creation to which he or she rightfully belongs--a status of which the jury must not lose sight in making its life or death determination.

The animal metaphor argument in this capital case so tainted and diluted the jury's decision on the ultimate question of punishment that defendants, in my view, must be given new sentencing hearings. The argument is so fundamentally wrong that the trial judge should have corrected it on his own motion. See State v. Smith, supra, 279 N.C. 163, 181 S.E.2d 458. Nor is the harm done lessened by the fact that some of this argument occurred in the guilt phase. See State v. Hines, supra, 286 N.C. 377, 211 S.E.2d 201.

I also think the trial court committed reversible error in the sentencing phase when it refused defendants' requests to have their pre-trial offer to take a polygraph examination submitted for the jury's consideration.

In considering this question, the majority has not adopted the appropriate test in determining when a proferred mitigating circumstance should be submitted. The majority quotes only a definition of a mitigating circumstance from State v.

Irwin, 304 N.C. 93, 104, 282 S.E.2d 439, 446-47 (1981). The very next sentence in Irwin gives the appropriate test for whether a particular circumstance should be submitted. The appropriate test and a corollary are set forth in Irwin as follows:

> The U.S. Supreme Court has held that any aspect of defendant's character, record or circumstance of the particular offense which defendant offers as a mitigating circumstance should be considered by the sentencer. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed. 2d 973, 98 S.Ct. 2954 (1978). However, evidence irrelevant to these factors may be properly excluded by the trial court. Lockett v. Ohio, supra, p. 604, n. 12.

304 N.C. at 104, 282 S.E.2d at 447. This Court also held in State v. Johnson, 298 N.C. 47, 72, 257 S.E.2d 597, 616 (1979), that upon proper request the trial court must submit to the jury any circumstance "that the jury could reasonably deem . . . to have mitigating value . . . ."

The question is, therefore, whether defendants' offer to take a polygraph examination during the investigative stages of this case is a circumstance relating to their character which a jury might reasonably deem to have mitigating value. I think it is such a circumstance. It is in the nature of an offer of cooperation with investigators much like defendant Craig's consent to the search of his home, which was submitted as a mitigating circumstance in his case.

The majority's reliance on State v. Grier, 307 N.C. 628, 300 S.E.2d 351 (1983), holding polygraph test results inadmissible as evidence at trial even in the presence of a stipulation of admissibility, is misplaced. Grier overruled earlier cases holding that the parties could stipulate the

admissibility of polygraph test results. This was the law when defendant [illegible] their offer to take the test. Their offer, therefore, should be considered in light of the law governing such offers at the time the offer was made. Further, even in Grier we noted that our holding was not intended to "affect the use of the polygraph for investigatory purposes." 307 N.C. at 645, 300 S.E.2d at 361.

In this case when defendants offered to submit to polygraph examinations they presumably were aware that under the law at that time, the test result could be stipulated into evidence at their trials. Further, the polygraph test results might have been an aid in the investigation of these crimes, particularly in the investigator's efforts to determine more precisely the roles which defendants--as opposed to their accomplice and principal state's witness, Betty Howie--played in the crimes.

Thus, each defendant's offer to submit to polygraph testing was relevant to his character in that it was some evidence of his willingness to cooperate in the investigation of the murders. The jury should have been allowed to determine in each case whether the offer did constitute a mitigating circumstance.

Justice Frye joins in this dissenting opinion

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20 June 83

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OPPOSITION

BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

• ORIGINAL •

NO. 86-7075

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ANDREW WEDDINGTON CRAIG,

Petitioner,

v.

THE STATE OF NORTH CAROLINA

Respondent.

FRANCIS MARION ANTHONY,

Petitioner,

v.

THE STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE EIGHTH AMENDMENT'S PROHIBITION AGAINST IMPOSITION OF THE DEATH PENALTY ON ONE . . . WHO AIDS AND ABETS A FELONY IN THE COURSE OF WHICH A MURDER IS COMMITTED BUT WHO DOES NOT KILL, ATTEMPT TO KILL, OR INTEND THAT A KILLING TAKE PLACE, WAS VIOLATED IN THIS CASE.

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BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court Rules, the State of North Carolina responds to the Petition for Writ of Certiorari of Andrew Weddington Craig and Francis Marion Anthony and requests that this Court deny the Petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

Andrew Weddington Craig and Francis Marion Anthony were tried and convicted of first-degree murder, robbery with a dangerous weapon, and common-law robbery in the Superior Court of Cabarrus County, North Carolina. Both were sentenced to death on March 3, 1982, for their first-degree murder convictions. In an opinion reported in State v. Craig and Anthony, 308 N.C. 446, 302 S.E.2d 740 (1983), the Supreme Court of North Carolina found no error in the convictions and affirmed the judgments of death.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

A. Procedural History

The Petitioners, Andrew Weddington Craig and Francis Marion Anthony, hereinafter referred to as Craig and Anthony, were indicted at the August 17, 1981, Criminal Session of Superior Court, by the Grand Jury of Cabarrus County, North Carolina, for the offenses of common-law robbery, robbery with a dangerous weapon, and first-degree murder. Their cases came on for trial on February 22, 1982. Both Craig and Anthony were found guilty of common-law robbery, robbery with a dangerous weapon and first-degree murder. They were found guilty of first-degree murder under the theory of premeditation and deliberation as well as the separate and additional theory of felony murder.

At the sentencing hearing, the jury found as to both Craig and Anthony beyond a reasonable doubt that (1) the murder was committed for pecuniary gain;[1] (2) the murder was especially heinous, atrocious or cruel;[2] and (3) the murder was part of a course of conduct in which they engaged and which included the commission by them other crimes of violence against another person or persons.[3] The jury found factors in mitigation, but found that such factors did not outweigh the aggravating factors presented and that the aggravating factors, as diminished by the mitigating evidence, was sufficiently substantial to warrant imposition of the death penalty. The jury recommended a sentence of death as to both Craig and Anthony. They were sentenced to terms of 40 years on the robbery with a dangerous weapon charge and 10 years on the common-law robbery charge, to run consecutively.

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[1] N.C.Gen.Stat. §15A-2000(e)(6)

[2] N.C.Gen.Stat. §15A-2000(e)(9)

[3] N.C.Gen.Stat. §15A-2000(e)(11)

Notice of appeal was given to the North Carolina Supreme Court. In an opinion filed on May 31, 1983, (State v. Craig and Anthony, 308 N.C. 446, 302 S.E.2d 740), the Supreme Court of North Carolina found no error as to either Craig or Anthony in the guilt phase or sentencing phase of their trial.

Thereafter, a Petition for Writ of Certiorari was filed in the United States Supreme Court. On October 11, 1983, the United States Supreme Court denied said Petition. Craig and Anthony v. North Carolina, 464 U.S. 908 (1983).

On January 12, 1984, on the basis of alleged newly discovered evidence, Craig and Anthony filed a joint Motion for Appropriate Relief[4] in the Superior Court of Cabarrus County, North Carolina. An evidentiary hearing was held on said motion and on May 2, 1986, the Superior Court denied said motion.

On December 16, 1986, Craig and Anthony jointly petitioned the North Carolina Supreme Court for Writ of Certiorari to review the decision of the Superior Court denying their Motion for Appropriate Relief. On April 7, 1987, the Petition for Certiorari to review the order of the Superior Court was denied by the North Carolina Supreme Court. On or about June 4, 1987, Craig and Anthony petitioned this Court for a Writ of Certiorari.

B. The Evidence at Trial

The State presented evidence which, as summarized by the Supreme Court of North Carolina in its opinion, showed the following:

> "Seab and Edith (Ritch), husband and wife, left their home . . . on 3 July 1981 and went to a friend's home . . . for the purpose of drinking alcoholic beverages. The Ritches drank heavily from 3 July 1981 until 8 July 1981, at which time they decided to return to their home . . . Seab and Edith Ritch consumed large quantities of intoxicants on 8 July 1981 and on their way home, decided to stop under a bridge on the Rocky River Road in order to finish drinking a bottle of Vodka. After stopping at the bridge, Seab Ritch left his vehicle, walked down to the river's edge where a man was fishing and offered the man a drink. At this time, Edith Ritch was in the passenger's seat of the Ritch vehicle.

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[4] N.C.Gen.Stat. §1411 et.seq. - This is the statutory procedure under North Carolina law for raising post-conviction issues.

After a while, five persons, including the Defendants (Andrew Weddington Craig and Francis Marion Anthony), began fishing on the opposite side of the river from where Seab Ritch was located. There was some conversation across the river causing the Defendants (Craig and Anthony) and Betty Howie to come over to where Seab Ritch was sitting for the purpose of getting a drink. After drinking Mr. Ritch's Vodka, the Defendants (Craig and Anthony) attacked and beat Mr. Ritch and took from his possession a wallet, some cash, and a pocket knife. When this was completed, they descended upon Edith Ritch who was extremely intoxicated with a blood alcohol level of at least .2%. After telling the Defendants that she had no money, Edith Ritch was jerked from her vehicle and thrown to the ground. The Defendant Craig took the pocket knife obtained from Seab Ritch and began stabbing Edith Ritch as she begged him not to kill her. After repeatedly stabbing the victim, the Defendant Craig handed the knife to Betty Jean Howie, an accomplice, who testified on behalf of the State pursuant to a plea bargain. She stabbed the victim repeatedly in the abdomen. Then the Defendant Anthony took the knife and stabbed Edith Ritch until death ensued. In all, Edith Ritch was stabbed 37 times.

Before leaving the scene, the Defendants removed from the Ritch vehicle, Edith Ritch's pocket book, an FM radio converter and the truck's battery. The Defendants left in a car driven by Betty Jean Howie's brother, Bobby Howie, who was not involved in either incident. The Defendant Craig was arrested for murder on 10 July 1981 and Defendant Anthony was arrested for murder on 12 July 1981."

Neither Craig nor Anthony presented any evidence during the guilt phase of their trial.

C. The Evidence at the Motion for Appropriate Relief Hearing

Craig and Anthony's evidence at the evidentiary hearing on the Motion for Appropriate Relief consisted solely of the witness, Betty Jean Howie, hereinafter referred to as Howie.

Howie was a participant in the murder of Edith Ritch and the robberies of both Seab and Edith Ritch. She testified at the trial of Craig and Anthony as a witness for the State and later received a life sentence for her participation in these offenses.

At the motion hearing, Howie testified that she had lied in certain respects at trial. Essentially, she stated that she killed Edith Ritch; that she alone stabbed Edith Ritch; and that Craig and Anthony were near by while Mrs. Ritch was being killed. This testimony was in conflict with her trial testimony, that each, Craig, Anthony and herself, had all personally used

the knife and inflicted wounds in the in the stabbing death of Mrs. Ritch. However, Howie's hearing testimony reaffirmed that she, Craig and Anthony had all been involved in the robbing of both Seab and Edith Ritch.

D. The Superior Court's Order Denying Craig and Anthony's Motion for Appropriate Relief

The Superior Court denied Craig and Anthony's Motion for Appropriate Relief on the factual findings and conclusions that the testimony given by the convicted accomplice, Betty Jean Howie, at the motion hearing was probably not true; that the partially recanted or changed testimony of Howie would not have had any reasonable likelihood of affecting the jury verdict; and that such testimony was not of such nature that a different result would probably be reached at a new trial. The Superior Court further concluded that even if such "new" testimony of Howie was to be believed, such evidence would constitute murder in the first degree by each Petitioner in the perpetration of a felony. The Court finally found and concluded that such "new" evidence clearly showed that each Craig and Anthony participated in the killing, attempted to kill, or intended the killing in the commission of the robbery.

REASONS WHY THE WRIT SHOULD NOT ISSUE

THE DECISION OF THE SUPERIOR COURT OF CABARRUS COUNTY, NORTH CAROLINA, IS BASED ON A CORRECT APPLICATION OF ENMUND V. FLORIDA, 458 U.S. 782 (1982) AND THE NORTH CAROLINA LAW GOVERNING THE GRANTS OF NEW TRIALS ON THE BASIS OF NEWLY DISCOVERED DISCOVERED EVIDENCE.

The Petitioners, in requesting that this Court issue its Writ of Certiorari, argue that the Eighth Amendment's prohibition against imposition of the death penalty on "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed," was violated in their case, citing Enmund v. Florida, 458 U.S. 782 (1982).

Craig and Anthony contend that the partial recantation of the witness Betty Jean Howie and her revised version[5] of the circumstances surrouding the death of Mrs. Ritch leaves their death sentences without support as a matter of law. There is no Enmund issue in the instant case. The North Carolina Courts have consistently applied the holding in Enmund v. Florida, supra, to felony murder cases in North Carolina since that decision was first announced. See, State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983).

In this case, Craig and Anthony were both convicted of first-degree murder on the theory of premeditation and deliberation as well as felony murder. The finding of a premeditated and deliberated murder obviates the necessity of Enmund issues under North Carolina law. State v. Stokes, 308 N.C. 634, 651, 81, 304 S.E.2d 184, 195 (1985).

In North Carolina, murder in the first degree is defined as the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. State v. Brown, 315 N.C. 40, 58, 337 S.E.2d 808, 822 (1985), cert. denied, 106 S.Ct. 2293 (1966); N.C.G.S. §14-17. Premeditation means that the act was thought out beforehand for some length of time, however short. No particular amount of time is necessary for the mental processes of premeditatio... State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980). Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. State v. Bush, 307 N.C. 152, 297 S.E.2d 563 (1982). A specific intent to kill under North Carolina law is an essential element of first-degree murder. State v. Propst, 274 N.C. 62, 71, 161 S.E.2d 560, 567 (1968).

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[5] Howie's trial testimony was that she, Craig and Anthony all personally used the knife and inflicted wounds in the stabbing death of Mrs. Ritch. Her testimony at the post-conviction hearing was that she alone did the stabbing and killing but that Craig and Anthony had been involved in the robberies of both Mr. and Mrs. Ritch.

Proof of premeditation and deliberation is also proof of intent to kill. State v. Jones, 303 N.C. 500, 505, 279 S.E.2d 835, 839 (1981).

The jury in this case was instructed that in order to find Craig and Anthony guilty of first-degree murder on the basis of premeditation and deliberation, it must find a specific intent to kill, beyond a reasonable doubt, at the time the murder took place. The jury's instructions and verdict on first-degree murder on the basis of premeditation and deliberation leaves no doubt that the verdict rested on a finding that Craig and Anthony killed and intended to kill. The Eighth Amendment's requirement of a reliability determination, as to whether one subject to the death penalty killed, attempted to kill, or intended a killing to take place, has therefore been met. Cabana v. Bullock, 106 S.Ct. 689 (1986).

Enmund, likewise, does not apply in a felony murder case if all the evidence discloses that the accused was the actual perpetrator who delivered the fatal blows. State v. Stokes, supra. All the evidence at trial disclosed that Craig, Anthony and the witness Howie all individually and collectively participated in the ruthless stabbing of Mrs. Ritch. Twenty-eight months after the trial, the witness Howie recanted portions of her trial testimony. This recantation, however, in no way undermines the reliability of the sentences pursuant to Enmund. The Superior Court, at the post-conviction hearing, found that Howie's partially recanted testimony that she did all of the stabbing was probably not true. The Court went on to find, however, that even if Howie's "new" version of the killing was to be believed, that the evidence clearly showed that the Petitioners participated in the killing or intended that the killing take place. To the extent that any Enmund findings were required to be made on the basis of the recanted testimony, such findings were made by the Superior Court. Enmund findings may be made in any adequate proceeding before some appropriate tribunal - be it an Appellate Court, a trial judge or a jury. Cabana v. Bullock, supra.

In Petitioners' case, Enmund only becomes applicable if one believes the "new" version of the killing by the witness Howie. Craig and Anthony's newly discovered evidence has been presented and considered. The credibility determinations have been made by the Superior Court against the revised testimony of Howie. Counsel for Craig and Anthony understandably judge that credibility differently. However, it is not the function of this Court to reassess credibility findings of the State Superior Court. The Superior Court had the best opportunity to observe the witness and to assess the reliability and credibility of same.

Craig and Anthony argue that their case should be remanded to State Court in light of Tison v. Arizona, 55 U.S.L.W. 4496 (U.S. Apr. 21, 1987) for a determination on their mens rea. Tison[6] has no applicability to these Petitioners, since the Superior Court found that Craig and Anthony participated in the murder and intended it. Craig and Anthony admit (p. 12 of Petition for Writ of Certiorari) that their participation in the robbery of Mrs. Ritch would satisfy the participation prong of Tison.

In addition to the Enmund contention, Craig and Anthony allege that the Superior Court did not correctly analyze and apply the law relating to newly discovered evidence and recanted testimony under North Carolina law.

There are certain general and familiar rules of North Carolina law relating to the granting and denying of Motions for Appropriate Relief. The granting of a new trial in a criminal case on the ground of newly discovered evidence rests in the sound discretion of the trial court. The decision of the trial court is not subject to review and will not be disturbed in the absence of a showing of a clear abuse of discretion.

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[6] Tison v. Arizona, 55 U.S.L.W. 4496 (U.S. Apr. 21, 1987). The Eighth Amendment does not prohibit the death penalty for those who neither intended to kill nor inflict the fatal wounds, so long as the person's participation in the felony that results in murder is major and he/she had the culpable mental state of reckless indifference to human life.

State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976); State v. Martin, 40 N.C.App. 408, 252 S.E.2d 859 (1979). The findings of fact by the Superior Court in granting or denying a Motion for Appropriate Relief are binding upon the Appellate Courts of the State of North Carolina if the findings are supported by evidence in the record, even if the evidence is conflicting. State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984); State v. Stevens, 305 N.C. 712, 291 S.E.2d 585 (1982).

In order for a new trial to be granted on the ground of newly discovered evidence, it must appear that: (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976); State v. Casey, 201 N.C. 620, 161 S.E.2d 81 (1931).

The Superior Court in this case found that the newly discovered evidence, the partially recanted testimony of the State's witness, Betty Jean Howie, was probably not true and that such evidence was not of such nature that a different result would probably be reached at a new trial. Under North Carolina law, it is necessary for any applicant to meet all seven of the requirements set forth in State v. Beaver, supra, and State v. Casey, supra, to obtain a new trial on the basis of newly discovered evidence. The denial of a new trial is proper if any applicant fails to meet any one of those requirements. State v. Martin, 40 N.C.App. 408, 252, S.E.2d 859 (1979).

Craig and Anthony rely on State v. Ellers, 234 N.C. 42, 65 S.E.2d 503 (1951) to contend that the Superior Court ignored controlling North Carolina Supreme Court precedent. In Ellers,

after the jury returned its verdict, but before judgment, the trial judge allowed a witness, on whose testimony the State relied for conviction, to take the witness stand and repudiate his testimony. In the context of those facts and upon a motion to set aside the jury's verdict, it was held that the trial judge should have allowed the motion to set the verdict aside.

The obvious distinction between Ellers and this case is that the witness in Ellers repudiated his testimony at trial and before judgment, as opposed to two and one-half years later in the present case. This patent distinction was noted by the Chief Judge of the North Carolina Court of Appeals in State v. Blalock, 13 N.C.App. 711, 187 S.E.2d 404 (1972). There, as here, it was asserted that Ellers dictated a new trial. The Chief Judge of the North Carolina Court of Appeals pointed out that Ellers was distinguishable and not controlling in that the witness in Ellers repudiated his testimony before judgment and the witness in Blalock, as in this case, repudiated his testimony after judgment.

The undersigned has found no North Carolina case which cites Ellers as authority for the proposition that the mere recantation of testimony after judgment, in and of itself, requires a new trial. In fact, Ellers has only been mentioned in four (4) North Carolina cases[7] since it was handed down in 1951. The two North Carolina Supreme Court cases which mentioned Ellers do not deal with the issue of a recanting witness and a new trial. The Court of Appeal cases which mentioned Ellers are State v. Blalock, supra, and State v. Shelton, 21 N.C.App. 662, 665, 205 S.E.2d 316, 318 (1974). As noted above, the Court of Appeals in the Blalock case distinguished Ellers on the grounds that the recantation occurred prior to judgment. The other Court of Appeals case, State v. Shelton, supra, mentioning Ellers, discusses the unreliability of a recanting witness.

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[7] Those cases are State v. Taylor, 236 N.C. 130, 132, 71 S.E.2d 924 (1952); State v. Blalock, 13 N.C.App. 711, 717, 187 S.E.2d 404 (1972); State v. Shelton, 21 N.C.App. 662, 665, 205 S.E.2d 316 (1974); and State v. Parker, 316 N.C. 295, 303, 341 S.E.2d 555, 560 (1986).

The Court noted in Shelton, that:

> "Many jurisdictions refused to hold that a trial judge abuses his discretion in denying a motion for a new trial for newly discovered evidence on the basis of the recantation of a witness, such testimony is exceedingly unreliable, and it is the duty of the trial court to deny the motion for new trial where it is not satisfied that such testimony is true, especially where the recantation involves a confession of perjury or where there is a repudiation of the recantation. See annotations at 33 A.L.R. 550, 74 A.L.R. 757, 158 A.L.R. 1062 and 51 A.L.R.3rd 907. See, also, State v. Ellers 234 N.C. 42, 65 S.E.2d 503 (1951); State v. Roddy, 253 N.C. 574, 117 S.E.2d 401 (1960); State v. Blalock, supra; State v. Chambers, 14 N.C.App. 249, 188 S.E.2d 54 (1972);and State v. Bynam, 20 N.C. 177, 201 S.E.2d 93 (1973). If recantation of witnesses are suspect, so are post-trial statements by convicted co-defendants."

Shelton clearly states that recantations of witnesses, particularly if they are post-trial statements by a convicted co-defendant, as is the witness Howie, are considered to be exceedingly unreliable and suspect under North Carolina law. Shelton is certainly in accord with the general rule of law that courts do not grant new trials on statements by a witness after a criminal trial tending to show his/her trial testimony was perjured. 33 A.L.R. 550.

The essence of Craig and Anthony's Petition, based on Ellers, is that the mere fact that a witness has, in some respects, recanted his/her trial testimony, entitles them to a new sentencing hearing without any decision by the appropriate fact finder as to whether or not the new testimony is probably true. Such contention conflicts with the required duty of the Superior Court to deny a motion for new trial where it is not satisfied that the newly discovered evidence is probably true. If the Petitioners' argument is correct, then the power to grant new trials does not rest with the Courts of the State of North Carolina, but rather with those witnesses who testified against the Petitioners.

The Superior Court did not shirk its responsibility in the Petitioners' case to determine whether or not the newly discovered evidence was probably true, as well as determining whether the other six requisites for granting a new trial on the

basis of newly discovered evidence had been met. After hearing the evidence, the Superior Court concluded that the evidence was probably not true. On the present record, there is no basis to conclude that the Superior Court abused its discretion in denying the Petitioners a new trial or sentencing hearing.

The Petitioners did not and have not objected to the Superior Ccurt's findings of fact in this matter. Indeed, all of the findings of fact are supported by the evidence that was heard below. The Petitioners assert that the trial court neglected "entirely plausible testimony", of the sole witness Howie, and that the court wrongfully assessed and discredited her testimony. The question of course is not whether the testimony was "plausible" but whether or not the testimony was probably true. The reality of this matter is that Howie's partial recantation was not credible and the Superior Court found that, to the extent that said testimony differed from the trial testimony, it was probably not true.

The partially recanting witness, Howie, testified at the motion hearing that she had made a statement to law enforcement officers. This statement was reduced to writing and signed by her shortly after she was taken into custody. At that time, no one had made any promise about second-degree murder in exchange for her testimony for the State. This statement was freely and voluntarily made to the officers. At that time, no promises had been made to her. After counsel was appointed to represent her several days after the original statement, she told her lawyer what had happened which was consistent with her original written statement. At the Petitioners' trial, the witness testified similarly to what she had stated in her signed, original statement. The witness gave no indication to anyone about any desire to change her testimony until November of 1983, two years and four months after the Petitioners' trial. These facts were found by the trial court in its order denying the Motion for Appropriate Relief. The Defendants cannot and do not dispute these facts.

The consistent nature and content of Howie's original statements to law enforcement, to her lawyer, and during Petitioners' trial, is certainly one strong factor that the Superior Court considered in reaching the conclusion that she was probably not telling the truth at such hearing wherein it differed from her earlier statements and testimony. Howie's revised version also conflictd with trial testimony of John and Bobby Howie that Craig and Anthony made statements to the effect that they had stabbed someone.[8]

Petitioners, of course, disagree with the Superior Court's finding and conclusion that the "partially recanted" testimony was probably not true.

However, it is not this Court's function to reassess credibility findings. There is probably no class of proof which is considered to be so unreliable as is recanted testimony. Such testimony is looked upon with the utmost suspicion. United States v. Johnson, 487 F.2d. 1278 (4th Cir. 1973); Thompson v. Garrison, 516 F.2d 986 (4th Cir. 1975); United States v. Adi, 759 F.2d 404 (5th Cir. 1985). See also, United States v. Kearney, 682 F.2d 214 (Court of Appeals, District of Columbia Cir. 1982).

Indeed, the Superior Court found that in some instances, Howie's revised testimony was incredible. It is nothing more than a conclusion that the revised version was not to be believed. This finding and conclusion is supported by the record. [State v. Hoots, 76 N.C.App. 616, 334 S.E.2d 74 (1985), 785 F.2d 1214 (4th Cir. 1986). The trial judge found witness was not credible].

The Supreme Court concluded that the newly discovered evidence probably is not true and is not of such a nature that a different result would probably be reached at a new trial. These conclusions are supported by the facts. Counsel for the Petitioners make an emotional argument that there can be no confidence in the jury's verdict in the fact of the partial recantation. The reality of this matter is that the partial recantation was not credible and to the extent such testimony

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[8] Trial Transcript at pages 378, 479-481

differed from the trial testimony, it was probably not true. Even if such revised testimony was believed, the Defendants would still be guilty of first-degree murder on the theory of felony murder.

Counsel for the Petitioners acknowledge that the revised testimony, if believed, "might not necessarily render invalid, Petitioners' convictions of felony murder on the view that they all acted in concert in robbing the woman." (P. 11 of Petition for Writ of Certiorari). Counsel are correct in this acknowledgement. If two people join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose or as a natural and probable consequence thereof. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), vacated on other grounds 408 U.S. 939 (1972).

While the partially recanted version of the stabbing exonerates Craig and Anthony from any participation in the actual stabbing, if one believes that testimony, there is no contention that the stabbing did not occur as a part of the robbery of Mrs. Ritch. The trial evidence and the evidence at the motion hearing, clearly indicate that the murder of Mrs. Ritch occurred while she was being robbed. There is no evidence or contention that either of the Petitioners had ceased all criminal activity when Mrs. Ritch was stabbed.

Under North Carolina law, the test for whether a felony, and a murder are so connected as to invoke the felony murder rule was articulated by the North Carolina Supreme Court in State v. Hutchins, 303 N.C. 321, 345, 279 S.E.2d 788, 803 (1981):

> "A killing is committed in the perpetration or attempted perpetration of a felony for the purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death so that the homicide is a part of a series of incidents which form one continuous transaction."

In finding number 7 of Superior Court's order denying Petitioners a new trial upon their Motion for Appropriate Relief, the Court found as a fact that Howie and the Petitioners

> "beat, kicked and stomped the male victim, Seab Ritch, robbed him and left him for dead. That they then proceeded to the truck where the female victim, Edith Ritch, was dragged from the truck, beaten, stomped and stabbed 37 times and killed. That Francis Marion Anthony beat and stomped the female victim. That Sonny Craig gave Howie the knife after he cut the the battery cable with it, and she then used the knife to stab the female victim to death. That Craig took the battery while the kicking and stomping was occurring. Francis Marion Anthony took the converter out of the car. That Howie took the pocket book of the female victim."

These findings are clearly supported by the testimony of the recanting witness Howie at the motion hearing. The Defendants did not object to this finding of fact and do not contend in their Petition that there was no evidence to support this finding.

In finding number 8, the Superior Court found that the original trial judge had instructed the jury on the theory of acting in concert in the perpetration of a robbery with a common purpose to commit robbery. This finding is supported by the evidence.

Findings 7 and 8 of the Superior Court's order clearly support the conclusion that Howie's testimony at the motion hearing, if believed, would constitute first-degree murder under the felony murder rule. The stabbing of Mrs. Ritch was well within the scope of the robbery which was committed upon her. The killing in this case resulted from and was the cumulation of the Petitioners' course of criminal conduct in robbing Seab and Edith Ritch. See, State v. Fields, 315 N.C. 191, 197, 337 S.E.2d 518, 522 (1986).

The Superior Court acted soundly within its discretion in denying the Petitioners' Motion for Appropriate Relief based on newly discovered evidence under North Carolina law. The jury's verdict of premeditated murder, as well as felony murder, leaves no doubt that the verdict noted as a finding that Craig and Anthony killed and intended to kill. There has been no showing of error, abuse of discretion by the Superior Court, misapplication of the law, or citation of authority which would warrant this Court's issuance of its Writ of Certiorari to review this matter.

Under North Carolina law, there is no right of direct appeal of the denial of a Motion for Appropriate Relief by the Superior Court. N.C.Gen.Stat. §7A-32(b) (1981); N.C.Gen.Stat. §1422(c)(3) (1983). A review of the Superior Court's decision in such a matter is discretionary, not automatic. Under North Carolina law, a defendant must first past the hurdle of demonstrating that appellate review of the Superior Court's action is warranted. The Writ of Certiorari is an "extraordinary remedial Writ" which "lies only to review judicial . . . action to ascertain its validity and to correct errors therein" under North Carolina Appellate procedure. State v. Roux, 263 N.C. 149, 153, 139 S.E.2d 189, 192 (1964).

Upon consideration of the Petition filed by the Petitioners for a Writ of Certiorari to review the order of the Superior Court, Cabarrus County, North Carolina, denying the Motion for Appropriate Relief, the Supreme Court of North Carolina denied said Petition.

These rules are similar to United States Supreme Court Rule 17 which provides that review on Writ of Certiorari is a matter of judicial discretion, granted only when there are special and important reasons therefore. There are no such reasons in this case.

After considering Craig and Anthony's Petition for Writ of Certiorari, the North Carolina Surpeme Court denied review. There is no important question of Federal law in this case.

Therefore, this Court ought not issue its Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the State of North Carolina submits that Andrew Weddington Craig and Francis Marion Anthony's Petition for Writ of Certiorari be denied.

Respectfully submitted this the 26 day of June, 1987.

LACY H. THORNBURG
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day served a copy of the foregoing BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon the attorneys of record for the Petitioners by depositing a copy of the same in the United States Mail, postage prepaid, to the following address:

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This the 26 day of June, 1987.

BY: William N. Farrell, Jr.
William N. Farrell, Jr.
Special Deputy Attorney General

NO. 86-7075

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ANDREW WEDDINGTON CRAIG, and FRANCIS MARION ANTHONY, Petitioners,	)	
V.	)	AFFIDAVIT OF MAILING
STATE OF NORTH CAROLINA, Respondent.	)	

STATE OF NORTH CAROLINA

COUNTY OF WAKE

WILLIAM N. FARRELL, JR., being duly sworn, says:

1. I am a Special Deputy Attorney General for the State of North Carolina representing the Respondent, State of North Carolina.

2. On June 26, 1987 at approximately 4:30 p.m. EST, I personally placed the original and nine copies of the enclosed Response to Petition for Writ of Certiorari to the Supreme Court of the United States in an envelope properly addressed to the Clerk of this Court, with first class postage prepaid, and deposited the envelope in a mailbox under the exclusive care and custody of the United States Postal Service within the City of Raleigh, North Carolina.

William N. Farrell, Jr.

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Sworn and Subscribed Before
me on this the 26th day of June, 1987.

Donna R. Douglas
Notary Public

My Commission Expires: 12-21-88

OPINION

SUPREME COURT OF THE UNITED STATES

ANDREW WEDDINGTON CRAIG AND FRANCIS MARION ANTHONY *v.* NORTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NORTH CAROLINA, CABARRUS COUNTY

No. 86-7075. Decided October 5, 1987

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to believe that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). But even if I did not hold this view, I would grant this petition for certiorari because the state courts failed to give proper consideration to a recantation by the prosecution's star witness that throws grave doubt on the propriety of sentencing petitioners to death.

I

A grand jury indicted petitioners Andrew Weddington Craig and Francis Marion Anthony in 1981 for the offenses of first-degree murder, common-law robbery, and robbery with a dangerous weapon. At trial, the prosecution attempted to prove that petitioners and Betty Jean Howie had robbed Seab and Edith Ritch and then had killed Edith Ritch by stabbing her repeatedly. Howie's testimony was the only evidence offered to show that petitioners had participated in the stabbing. Howie stated that she and petitioners had taken turns stabbing Edith Ritch with a pocket knife. This testimony was, at the very least, undermined by medical testimony that the multiple stab wounds were "very much uniform in depth, range, uniform in angle of penetration and probably uniform forcewise." Pet. for Cert. 6. At the close

of trial, petitioners were convicted of all charges and sentenced to death. The Supreme Court of North Carolina affirmed the convictions and sentences. Howie pleaded guilty to murder in the second degree and received a sentence of life imprisonment.

A few months after the North Carolina Supreme Court affirmed petitioners' convictions and sentences, petitioner Anthony received an unsolicited letter from Howie stating that she wanted to "go[] back to court and tell[] the truth" about the case. Pet. for Cert. 7. Petitioners immediately filed a joint motion for appropriate relief, and the trial court held a hearing at which Howie testified. In her testimony, Howie stated that she alone had stabbed Edith Ritch, although petitioners had participated in the robbery and remained on the scene during the murder. Howie further testified that she was recanting her trial testimony over the objections of her family and her counsel, who had warned her that the recantation would expose her to further prosecution. Howie explained that "I was trying to live with a lie and no one knows . . . what it has done to me, what it has taken me through." *Id.*, at 8. After listening to Howie's testimony, the trial court denied petitioners' motion for relief. In a cursory decision, the court first found that the recantation testimony was "probably not true" and "in some instances [was] incredible." App. to Pet. for Cert. A–2. The court then stated that even if the recantation were true, it would not change the result of the prior proceedings because the recantation itself showed that petitioners had "attempted to kill, or participated in the killing, or intended it, or contemplated that life may be taken in the commission of the felony robbery." *Id.*, at A–3.

II

The trial court's conclusion that Howie's recantation, if believed, would not change the result of the prior proceedings is insupportable under our case law. That conclusion rests on the view that a sentencer may permissibly impose the death

sentence if the defendant "contemplated that life may be taken in the commission" of a felony. In *Tison* v. *Arizona*, 481 U. S. —— (1987), however, this Court explicitly rejected such a view. We stated that the death penalty is supportable in felony-murder cases only upon a finding of intent to kill or upon a finding of reckless indifference to human life on the part of a major participant in the felony. *Id.*, at ——. The trial court's determination that Howie's recantation would not change the result of the sentencing proceeding thus was premised on an improper view of when the death sentence may constitutionally be imposed. In these circumstances, the determination cannot support the denial of petitioners' requested relief. That denial must rest, if at all, on the court's determination of the credibility of Howie's recantation testimony.

I believe, however, that the court's credibility finding is constitutionally deficient. This Court often has recognized that the stark finality of the death penalty creates an enhanced "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion). In capital cases, we therefore have "invalidated procedural rules that tended to diminish the reliability of the sentencing determination" and have imposed a range of procedural safeguards in their place. *Beck* v. *Alabama*, 447 U. S. 625, 638 (1980). In keeping with this practice, I previously have espoused the view that when a life is hanging in the balance, a court may not reject the recantation of critical testimony without providing a specific explanation of "what it is about that recantation that warrants a conclusion that it is not credible evidence." *Dobbert* v. *Wainwright*, 468 U. S. 1231, 1235–36 (1984) (BRENNAN, J., dissenting). The lower court in this case failed to give even the semblance of such an explanation. Perhaps because the court believed the credibility determination to be superfluous in light of the court's alternative holding, the court said nothing more than that the

recantation was "probably not true" and "in some instances [was] incredible" The denial of petitioners' motion for relief on so slight a basis is inconsistent with the requirement of heightened procedural protections to ensure the reliability of sentencing determinations in capital cases.

III

Only three persons know who stabbed Edith Ritch. Two have insisted for many years that they took no part in the stabbing. The third, whose testimony provided the sole support for the prosecution's theory of the murder, now has confirmed their claim. There may be reasons to discount this recent recantation, but none has yet appeared on the record of this case. I would grant the petition for certiorari to ensure that petitioners do not go to their deaths before a court has given the requisite explanation.